No. 90-848-CSX
Status: GRANTED

Title: Kenneth Hilton, Petitioner
v.
South Carolina Railways Commission

Docketed:
November 29, 1990

Court: Supreme Court of South Carolina

Counsel for petitioner: Beckham,Robert J.

Counsel for respondent: Simons III,Keating L.

Entry	Date	Note	Proceedings and Orders
1	Nov 29 1990	G	Petition for writ of certiorari filed.
3	Dec 26 1990		Order extending time to file response to petition until January 28, 1991.
4	Jan 9 1991		DISTRIBUTED. February 15, 1991
5	Jan 28 1991	X	Brief of respondent SC Public Railways Commission in opposition filed.
6	Feb 19 1991		Petition GRANTED.
			**********
8	Mar 22 1991		Order extending time to file brief of petitioner on the merits until April 18, 1991.
9	Apr 5 1991	G	Motion of petitioner to dispense with printing the joint appendix filed.
10	Apr 15 1991		Motion of petitioner to dispense with printing the joint appendix GRANTED.
11	Apr 17 1991		Brief of petitioner Hilton filed.
12	Apr 18 1991		Brief amicus curiae of AFL-CIO filed.
14	May 8 1991		Order extending time to file brief of respondent on the merits until June 14, 1991.
15	Jun 14 1991		Brief of respondent South Carolina Public Railways Commission filed.
16	Jun 14 1991		Brief amici curiae of National Governors' Association, et al. filed.
17	Jul 12 1991		CIRCULATED.
18	Jul 12 1991	X	Reply brief of petitioner Kenneth Hilton filed.
19	Jul 19 1991		SET FOR ARGUMENT TUESDAY, OCTOBER 8, 1991. (4TH CASE)
20	Jul 22 1991		Certified copy of original record received.
21	Oct 8 1991		ARGUED.

90-848

No. _____

Supreme Court, U.S.
FILED
NOV 29 1990
JOSEPH F. SPANIOL, JR.
CLERK

In The

Supreme Court of the United States

October Term, 1990

KENNETH HILTON,

Petitioner,

v.

SOUTH CAROLINA PUBLIC RAILWAYS COMMISSION,

Respondent.

Petition For Writ Of Certiorari To The Supreme Court Of South Carolina

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Are the remedies provided by the Federal Employers' Liability Act, 45 U.S.C. §51 *et seq.*, available to employees injured while working in furtherance of interstate commerce for railroads owned and operated by a state?

2. Does a state that voluntarily engages in interstate railroad commerce thereby consent to the applicability of the Federal Employers' Liability Act, 45 U.S.C. §51 *et seq.*?

3. Does the opinion of the South Carolina Supreme Court in this case conflict with decisions of this Court holding that the federal statutory regulation of this Nation's railroads, including the FELA laws, pervasively pre-empt the field and apply to state-operated railroads?

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No. _____

In The

Supreme Court of the United States

October Term, 1990

KENNETH HILTON,

Petitioner,

v.

SOUTH CAROLINA PUBLIC RAILWAYS COMMISSION,

Respondent.

Petition For Writ Of Certiorari To The Supreme Court Of South Carolina

PETITION FOR WRIT OF CERTIORARI

GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

The date of the Opinion of the South Carolina Supreme Court is July 20, 1990 (see Appendix C). The date of denial of a timely Petition for Rehearing was September 4, 1990 (see Appendix A). The statutory provision believed to confer jurisdiction on this Court is 28 U.S.C. §1257(a):

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had . . . where any title, right, privilege, or immunity is specially set up or claimed

under the Constitution . . . or statutes of . . . the United States.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Article I Section 8, Clause 2, of the U.S. Constitution:

The Congress shall have Power . . . To regulate Commerce with foreign nations, and among the several States, and with the Indian Tribes.

45 U.S. Code, Section 51:

Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in while or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in

any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter.

STATEMENT OF THE CASE

Plaintiff originally filed his action in the United States District Court. Following the decision in *Welch v. Texas Dept. of Highways and Public Trans.*, 483 U.S. 468, 107 S.Ct. 2941, 97 L.Ed.2d 389 (1987), Plaintiff voluntarily dismissed that action and refiled his claim in the appropriate state court in South Carolina (see Appendix H). Plaintiff's Complaint there alleged that he was injured while employed by an interstate railroad and that he was entitled to the remedies provided by 45 U.S.C. §51 *et seq.* The Defendant filed a Motion to Dismiss, claiming that the State-operated railroad was not subject to the provisions of the FELA (see Appendix G). The trial court granted the Motion to Dismiss (see Appendix F). Plaintiff timely filed a Motion for Rehearing. The rehearing was denied by the trial court (see Appendix E). A timely appeal was then filed in the South Carolina Supreme Court. That Court affirmed the dismissal of Plaintiff's Complaint, holding that the provisions of 45 U.S.C. §51 *et seq.* did not apply to the state-owned railroad (see Appendix C). A timely Motion for Rehearing was denied by the South Carolina Supreme Court (see Appendix A, B). All rulings in the Supreme Court of South Carolina were predicated upon its earlier disposition of a similar case: *Freeman v. South Carolina Public Railways Comm.*, 393 S.E.2d 383 (1990) (see Appendix D).

FEDERAL QUESTION FACTORS

Plaintiff invoked the Federal question into this litigation by specifically claiming in his Complaint the rights afforded by 45 U.S.C. §51, *et seq.* (see Appendix H). The Defendant raised the applicability of the federal statute in its Motion to Dismiss, such defense being accepted by the trial court in its Order of Dismissal and by the Supreme Court of South Carolina in its Opinion affirming the trial court (see Appendix C, F, G).

ARGUMENT AMPLIFYING REASONS RELIED ON FOR ALLOWANCE FOR WRIT

Petitioner contends the ruling of the South Carolina Supreme Court (denying the protection of the FELA to an employee of an interstate railroad, owned by a state, who was injured in the course and scope of his work activities for that railroad) "conflicts with applicable decisions of this Court." [See Supreme Court Rule 10(c)]

Petitioner contends that the following decisions indicate that state-operated railroads are in fact subject to the provisions of the FELA:

> *Port Authority Trans-Hudson Corp. v. Feeney*, 58 L.W. 4536 (U.S. S.Ct. April 30, 1990) – a unanimous Court ruled that the state agency there involved (PATH) had consented to federal court jurisdiction in a FELA context. [While the thrust of the case centered upon the Eleventh Amendment immunity from states being sued in federal court, no member of the Court suggested that the FELA was not applicable to the state railroad. Indeed, that case would have been moot if the FELA were inapplicable!]

> *Parden v. Terminal Railway of Alabama Docks Dept.*, 377 U.S. 184, 84 S.Ct. 1207, 12 L.Ed.2d 233 (1964) – holding both that the FELA applied to state railroads *and* that the states were subject to federal court jurisdiction in FELA cases. [The jurisdictional aspect of the holding was overruled in *Welch v. Texas Dept. of Highways and Public Transportation*, 483 U.S. 468, 107 S.Ct. 2941, 97 L.Ed.2d 389 (1987), but the Court specifically declined to address the continued viability of the "applicability" holding in *Parden*.]
>
> *Petty v. Tennessee-Missouri Bridge Comm.*, 359 U.S. 275, 79 S.Ct. 785, 3 L.Ed. 2d 804 (1959) – holding that the Jones Act [FELA] affords a remedy to seamen employed by states. [Justice White, concurring, asserted this holding survived the *Welch* decision, 107 S.Ct. 2941, 2947.][1]

Further, the Opinion of the South Carolina Supreme Court contravenes other decisions recognizing that state-owned railroads are subject to the comprehensive federal regulation that has been in place for approximately 100 years in this Country.

---

[1] Indeed, the Reporter of Decisions for opinions of the Court sums up the *remedy* holding in *Welch* (as classified or "headnoted" for inclusion in U.S. Supreme Court Digest, Lawyers' Edition) thusly:

> Federal Employers' Liability and Compensation Acts §55 – Jones Act – action against state
>
> 3a-3c. The Jones Act (46 USCS Appx §688) affords a remedy to seamen employed by the state who suffer personal injury in the course of their employment. [Per White, Brennan, Marshall, Blackmun, and Stevens, JJ.]

In *United Transportation Union v. Long Island Railroad Co.*, 455 U.S. 678, 102 S.Ct. 1349, 71 L.Ed.2d 547 (1982) (hereafter "UTU"), the Court held that the Railway Labor Act, 45 U.S.C. §151 *et seq.*, applied to the state-owned Long Island Railroad, thereby permitting its employees to strike even though strikes by state employees were prohibited under state law:

> The determination of whether a federal law impairs a state's authority with respect to "areas of traditional [state] functions" may at times be a difficult one. In this case, however, we do not write on a clean slate. As the District Court noted, in *National League of Cities* we explicitly reaffirmed our holding in *United States v. California*, 297 U.S. 175, 56 S.Ct. 421, 80 L.Ed. 567 (1936), and in two other cases [*Parden v. Terminal R. Co.*, 377 U.S. 184, 84 S.Ct. 1207, 12 L.Ed.2d 233 (1964) and *California v. Taylor*, 353 U.S. 553, 77 S.Ct. 1037, 1 L.Ed.2d 1034 (1957)] involving federal regulation of railroads:
>
> > The holding of *United States v. California* . . . is quite consistent with our holding today. There California's activity to which the congressional command was directed was not in an area the States have regarded as integral parts of their governmental activities. It was, on the contrary, the operation of a railroad engaged in 'common carriage by rail in interstate commerce . . . ' 297 U.S. at 182 [56 S.Ct. 432]. 426 U.S. at 854 n. 18, 96 S.Ct. 2465, n. 18.
>
> 455 U.S. at 685.

The South Carolina court erroneously applied non-railroad precedents in concluding that the longstanding Federal regulation of this Nation's railroads did not

extend to state-operated rail carriers involved in interstate commerce. In its *Freeman* decision, the Supreme Court of South Carolina concluded that *Welch's* "unmistakably clear" test (for language required to abrogate the immunity of a state from being sued in federal court) was the appropriate test for determining the breadth of statutory application (393 S.E.2d at 384). In railroad statutory construction, however, the invariable holdings have subjected the states to the federal regulatory power. When urged to find that states are beyond the scope of federal rail legislation, this Court has repeatedly declined to exempt the states.

It is, of course, true that *Welch* requires great exactitude to overcome a state's Eleventh Amendment immunity from federal court jurisdiction. However, it is also true that the decisions in *United States v. California, California v. Taylor, Parden* and *UTU* reveal a quite different test to determine the applicability to the states of the laws Congress enacted to govern the railroad industry in America. These controlling decisions, emphasizing the national need for a uniform pattern of laws governing railroad operations, have unfailingly subjected state rail lines to the federal scheme of things, *even though none of these statutes referred specifically to public railroads as being within their coverage.* In fact, the Court has consistently interpreted the federal railroad laws as applicable to states even while *conceding* that Congress never specified or even considered whether state entities would be encompassed by these laws. This pattern was reviewed in *California v. Taylor*, 353 U.S. 533, 77 S.Ct. 1037, 11 L.Ed.2d 1034 (1957), where the Court observed:

[F]ederal statutes regulating interstate railroads, or their employees, have consistently been held to apply to publicly owned or operated railroads. Yet none of these statutes referred specifically to public railroads as being within their coverage. In *United States v. California*, [297 U.S. 175, 56 S.Ct. 421, 80 L.Ed. 567] . . . the State contended there, as it does here, that the Act was inapplicable to the Belt Railroad because a federal statute is presumed not to restrict a constituent sovereign State unless it expressly so provides. The Court said that this presumption "is an aid to consistent construction of statutes of the enacting sovereign when their purpose is in doubt, but it does not require that the aim of a statute fairly to be inferred be disregarded because not explicitly stated." 297 U.S. at page 186, 56 S.Ct. at page 425 . . . The Court then held unequivocally that the Safety Appliance Act was applicable to the Belt Railroad. "We can perceive no reason for extending it [the presumption] so as to exempt a business carried on by a state from the otherwise applicable provisions of an act of Congress, all embracing in scope and national in its purpose, which is as capable of being obstructed by state as by individual action." 297 U.S. at 186.

Nothing in the legislative history of the Railway Labor Act indicates that it should be treated differently from the above-mentioned railway statutes, insofar as its applicability to a state-owned railroad is concerned. Congress apparently did not discuss the applicability of the Railway Labor Act to a state-owned railroad. This omission is readily explainable in view of the limited operations of publicly owned railroads. We are told by the parties that there are today 30 publicly owned railroads, all of which are switching or terminal roads, and only 11 of which are operated directly by the public. The

fact the Congress chose to phrase the coverage of the Act in all-embracing terms indicates that state railroads were included within it. In fact, the consistent congressional pattern in railway legislation which preceded the Railway Labor Act was to employ all-inclusive language of coverage with no suggestion that state-owned railroads were not included.

The State contends that doubts are created about congressional intent to make the Railway Labor Act applicable to state owned railroads by the fact that in certain other federal statutes governing employer-employee relationships, Congress has expressly exempted employees of the United States or of a State. We believe, however, that this argument cuts the other way. When Congress wished to exclude state employees, it expressly so provided.

Id. 353 U.S. at 562-563, 77 S.Ct. at 1042-1044.

As to any "sovereign right" a state railway may assert so as to exempt it from federal control, the federal superiority of the commerce power over state-owned railroads engaging in interstate commerce was reiterated by the Court in the *California v. Taylor* decision:

> Finally, the State suggests that Congress has no constitutional power to interfere with the "sovereign right" of a State to control its employment relationships on a state owned railroad engaged in interstate commerce. In *United States v. State of California, supra*, this Court said that the State, although acting in its sovereign capacity in operating this Belt Railroad, necessarily so acted "in subordination to the power to regulate interstate commerce, which has been granted specifically to the national government." 297

> U.S. at page 184, 56 S.Ct. at page 424. "California, by engaging in interstate commerce by rail, has subjected itself to the commerce power, and it liable for a violation of the Safety Appliance Act, as are other carriers . . . " *Id.* 297 U.S. at page 185, 56 S.Ct. at page 424. That principle is no less applicable here. If California, by engaging in interstate commerce by rail, subjects itself to the commerce power so that Congress can make it conform to federal safety requirements, it also has subjected itself to that power so that Congress can regulate its employment relationships.
>
> *Id.* 353 U.S. at 568-569, 77 S.Ct. at 1045-1046.

In the process of statutory construction to determine the applicability of federal railroad legislation to the states, the Court is thus seen to have *not required exactitude* but has consistently included states within the scope of federal railroad statutes using identical terms of application to those used in the FELA.

Further, in *Freeman*, the South Carolina court considered as "dispositive" the ruling in *Will v. Michigan Dept. of State Police*, 491 U.S. ___, 109 S.Ct. 2304, 105 L.Ed.2d 45 (1989), in concluding its opinion by stating "As in *Will*, we find no rationale to subject States to FELA liability in State Courts, when Congress has expressed no intent to so subject them in Federal Court" (393 S.E.2d at 384). In a footnote on the same page, the South Carolina court acknowledged the decision [simultaneously issued with the *Will* opinion] in *Pennsylvania v. Union Gas*, 491 U.S. ___, 109 S.Ct. 2273, 105 L.Ed.2d 1 (1989). By ignoring this Court's "rationale" as explicated in *United States v. California, California v. Taylor, Parden* and *UTU*, the court

below bootstrapped itself into granting South Carolina an immunity that is broader than that afforded by Federal law. That, of course, is (emphatically) impermissible under this Court's holding in *Howlett v. Rose*, ___ U.S. ___ 110 S.Ct. 2430, 110 L.Ed.2d 332 (1990).

Petitioner contends that the precedents of this Court relating to the scope of Federal regulatory authority over interstate rail commerce constitute an "unmistakably clear" showing that 45 U.S.C. §51 applies to state entities engaged in such commerce.

CONCLUSION

The factors enumerated in the concluding paragraph of Justice White's opinion for the Court in *Welch* (Part IV C)[1] are equally applicable here:

1. The slate is *not* clean; this factor was noted by Chief Justice Burger in his opinion for a unanimous Court in *UTU* (455 U.S. at 684).

---

[1] In deciding yet another Eleventh Amendment case, we do not write on a clean slate. The general principle of state sovereign immunity has been adhered to without exception by this Court for almost a century. The dissent nevertheless urges the Court to ignore stare decisis and overrule the long and unbroken series of precedents reaffirming this principle. If the Court were to overrule these precedents, a number of other major decisions also would have to be reconsidered. As we have stated above, supra, at 9, the doctrine of stare decisis is of fundamental importance to the rule of law. For this reason, "any departure from the doctrine . . . demands special justification." 467 U.S. at 212.

2. The principle of law subjecting States to railway regulation has been adhered to without exception for many decades.

3. No special reason exists to repudiate the controlling precedents.

This Petition should be granted for the purpose of removing any doubt about the continued viability of this Court's precedents. The Supreme Court of South Carolina should not (as, indeed, it cannot) overrule *Parden*.

Respectfully submitted,

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and

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Counsel for Petitioner

No. _____

In The

Supreme Court of the United States

October Term, 1990

KENNETH HILTON,

Petitioner,

v.

SOUTH CAROLINA PUBLIC RAILWAYS COMMISSION,

Respondent.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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APPENDIX A

SEAL

THE SUPREME COURT OF SOUTH CAROLINA

CLYDE N. DAVIS, JR.
CLERK
BRENDA F. SHEALY
DEPUTY CLERK

P.O. BOX 11330
COLUMBIA, S.C. 29211
PHONE NO. 734-1080

September 4, 1990

Donald B. Clark, Esquire
P. O. Box 893
Charleston, S. C. 29402

Re: Kenneth Hilton v. South Carolina Public Railways Commission

Dear Mr. Clark:

The Court has refused your Petition for Rehearing in the above case in the following order:

"Petition for Rehearing denied.

/s/ George T. Gregory, Jr. C.J.
/s/ David W. Harwell A.J.
/s/ A. Lee Chandler A.J.
/s/ Ernest A. Pinney, Jr. A.J.
/s/ Jean H. Toal A.J.

September 4, 1990."

The remittitur in this matter is today being forwarded to the Clerk of Court for Charleston County.

Sincerely yours,
/s/ Clyde N. Davis Jr.
CLERK

CND,Jr./dmh

cc: Robert J. Beckham, Esquire
Keating L. Simons, III, Esquire

APPENDIX B

IN THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM CHARLESTON COUNTY
THE HONORABLE ELLIS B. DREW
CIVIL ACTION NO. 88-CP-10-705

KENNETH HILTON, Plaintiff-Appellant, versus SOUTH CAROLINA PUBLIC RAILWAYS COMMISSION, Defendant.	)	PETITION FOR REHEARING

COMES NOW Plaintiff-Appellant, pursuant to Rule 17, Rules of Practice in the Supreme Court and the Court of Appeals, and submits his Petition for Rehearing. Plaintiff-Appellant respectfully suggests that the Court has overlooked or failed to consider the following substantial matters:

1. This matter was disposed of without separate opinion pursuant to Rule 23, Rules of Practice in the Supreme court and the Court of Appeals, and the Court's prior ruling in *Freeman v. South Carolina Public Railways Commission*, ___ S.C. ___, ___ S.E.2d ___ (S.Ct. 1990) (Slip Opinion, No. 23234, filed July 2, 1990). In that decision, the Court failed to acknowledge that a majority (five) of the Justices of the United States Supreme Court in the plurality opinion of *Welch v. U.S. Dept. of Transportation*, 483 U.S. 468, 107 S.Ct. 2941, 97 L.Ed.2d 289 (1987) stated implicitly or explicitly that states were subject to suit in state courts under the Federal Employers' Liability Act (the "FELA"), because the concurring opinion of Justice

White in that case clearly reflects that a majority of the Court adhered to the view that the Jones Act, applicable to the same extent as the FELA, "affords a remedy to seamen employed by the States." *Id.* 483 U.S. at ___, 107 S.Ct. at 2957. See also the headnote, 97 L.Ed.2d at 392. It is respectfully submitted that if the Jones Act affords a remedy in the State courts to seamen employed by the States, then the FELA must also surely afford a remedy in the State courts to railway workers employed by the States.

2. The Court failed to acknowledge the significance of the supplemental authority submitted by Plaintiff-Appellant, *Port Authority Trans-Hudson Corp v. Feeney*, 110 S.Ct. 1868, 109 L.Ed.2d 264, 58 U.S.L.W. 4536 (April 30, 1990), wherein the unanimous Court assumed that the " . . . suit must be considered as one against the States," *Id.* 110 S.Ct. at 1872, in applying the FELA to a bi-state agency, but no member of the Court questioned whether the scope of the FELA language was inadequate to encompass such state employees.

3. The Court overlooked the important public policy concepts involved in the proper assessment of federal rail legislation, as enunciated by the United States Supreme Court in *United Transp. Union v. Long Island R. Co.*, 455 U.S. 678, 102 S.Ct. 1349, 71 L.Ed.2d 547 (1982):

> (a) In determining the scope of federal power regulating railroads, " . . . we do not write on a clean slate." *Id.* 455 U.S. at 684, 102 S.Ct. at 1354.
>
> (b) There appears to be no sound justification for a rule which would allow the states, by acquiring functions previously performed by the private sector, to erode federal authority in

areas traditionally subject to federal statutory regulation. Railroads have been subject to comprehensive federal regulations for nearly a century. *Id.* 455 U.S. at 687, 102 S.Ct. at 1354.

(c) "In addition, a state acquiring a railroad does so knowing that the railroad is subject to this long-standing and comprehensive scheme of federal regulation of its operations . . . " *Id.* 45 U.S. at 689-690, 102 S.Ct. at 1356. [Acknowledging that states which operate railroads in interstate commerce in effect "consent" to federal regulation – the same concept enunciated in the majority opinion in *Pennsylvania v. Union Gas*, 491 U.S. ___, 109 S.Ct. 2273, 105 L.Ed.2d 1 (1989) decided on the same date as the decision in *Will v. Michigan Dept. of State Police*, 491 U.S. ___, 109 S.Ct. 3204, 105 L.Ed.2d 45 (1989).

4. The Court overlooked the fact that the same five Justices who formed the majority in *Welch v. U.S. Dept. of Transportation* (affirming the applicability of the federal law to state owned operations) also constituted the majority in *Pennsylvania v. Union Gas*, 491 U.S. ___, 109 S.Ct. 2273, 105 L.Ed.2d 1 (1989), decided on the same date as the decision in *Will v. Michigan Dept. of State Police*, 491 U.S. ___, 109 S.Ct. 3204, 105 L.Ed.2d 45 (1989), which fact clearly supports the proposition that the *Will* opinion did not erode the majority position in *Welch*. The *Will* decision must be read as being consistent with the *Union Gas* decision, especially when they were issued contemporaneously.

5. Although appellate court decisions of at least two other states (Texas and Louisiana) appear to indicate that their doors will remain open to FELA claims against the states, Plaintiff-Appellant believes the *Freeman* case and this case are the first state appellate court decisions in the

United States to expressly discuss the issue presented, an issue which is not only one of great historical and practical significance in general, but one which may determine whether Plaintiff-Appellant will have any recourse for the debilitating and permanent injuries he received in the course of his employment with the Respondent. This Court's decision appears to break with a long tradition which has established that federal railway regulation preempts the field and must be applied *uniformly* throughout the country, regardless of who owns the railroad. As such, the Court should entertain additional arguments before permanently committing itself to a decision that may prove to be out of step with future state appellate court decisions which will undoubtedly arise in other jurisdictions.

Wherefore, Plaintiff-Appellant respectfully requests that this Honorable Court consider his Petition for Rehearing and permit him through his counsel to address these points more fully before the Court.

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ATTORNEYS FOR PLAINTIFF-APPELLANT

Charleston, South Carolina

July 28, 1990

APPENDIX C

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Kenneth Hilton,

Appellant,

v.

South Carolina Public Railways Commission,

Respondent.

Appeal From Charleston County
Ellis B. Drew, Judge

Memorandum Opinion No. 90-MO-213
Heard February 21, 1990 – Filed July 20, 1990

AFFIRMED

Donald B. Clark, of Rosen, Rosen & Hagood, of Charleston; and Robert J. Beckham, of Beckham, McAliley & Schulz, P.A., of Jacksonville, Florida, for appellant.

Keating L. Simons, III, of Holmes & Thompson, of Charleston, for respondent.

PER CURIAM: Affirmed pursuant to Supreme Court Rule 23 and under the authority of *Freeman v. South Carolina Public Railways Commission*, Op. No. 23234 (S.C. Sup. Ct. filed July 2, 1990) (a suit under the Federal

Employer's Liability Act (FELA) may not be maintained against this state in state courts).

/s/ George T. Gregory, Jr. C.J.
/s/ David W. Harwell A.J.
/s/ A. Lee Chandler A.J.
/s/ Ernest A. Pinney, Jr. A.J.
/s/ Jean H. Toal A.J.

APPENDIX D

Johnny R. FREEMAN, Appellant,

v.

SOUTH CAROLINA PUBLIC RAILWAYS COMMISSION,
Respondent.

No. 23234.

Supreme Court of South Carolina.

Heard Feb. 6, 1990.

Decided July 2, 1990.

Railway conductor filed personal injury suit under Federal Employers' Liability Act (FELA) in state court. The Circuit Court, Charleston County, Ellis B. Drew, Jr., Special Judge, dismissed action. Conductor appealed. The Supreme Court, Chandler, J., held that state was not subject to suit under FELA in state court in absence of unmistakably clear language in FELA expressing congressional intent to subject states to suit in federal courts.

Affirmed.

1. States ⇐191(1.25)

State was not subject to suit under Federal Employers' Liability Act (FELA) in state court absent unmistakably clear language in the Act abrogating state's immunity. Federal Employers' Liability Act, §§ 1 et seq., 6, 45 U.S.C.A. §§ 51 et seq., 56; U.S.C.A. Const. Amend. 11.

2. Federal Courts ⇐265

Eleventh Amendment bars suits in federal court against citizen's own state. U.S. C.A. Const.Amend. 11.

3. Federal Courts ⇐265

Eleventh Amendment does not bar suits against state in state court. U.S.C.A. Const.Amend. 11.

4. Federal Courts ⇐265

Congress will not be deemed to have overridden state's Eleventh Amendment immunity from suit in federal court unless Congress has, in fact, done so in unmistakably clear language in pertinent statute. U.S.C.A. Const.Amend. 11.

Donald J. Budman, of Solomon, Kahn, Smith & Baumil, Charleston, for appellant

Keating L. Simons, III, of Holmes & Thompson, Charleston, for respondent.

CHANDLER, Justice:

Johnny R. Freeman (Freeman) appeals an Order dismissing his action against Respondent, South Carolina Public Railways Commission (Railway).[1]

We affirm.

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[1] Railway is an agency of the State of South Carolina.

FACTS

Freeman, a conductor for Railway, was injured in July, 1986, while in the scope of his employment. Thereafter, he brought suit alleging Railway's liability under the Federal Employers' Liability Act (FELA), 45 U.S.C. § 51 *et seq.*[2] Circuit Court dismissed Freeman's complaint, holding that a FELA suit may not be maintained against a State in its Courts.

ISSUE

[1] The sole issue is whether a State may be subjected in its own Courts to FELA actions.

DISCUSSION

In *Parden v. Terminal Railway of Alabama*, 377 U.S. 184, 84 S.Ct. 1207, 12 L.Ed.2d 233 (1964), the U.S. Supreme Court held that an employee of a State owned railroad may maintain a FELA action against the State in Federal Court.

In reaching its decision, the Court addressed two issues: (1) Did Congress, in enacting FELA, intend to subject State owned railways to suit? and (2) Did Congress have the power to do so as against a State's claim of sovereign immunity?

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[2] FELA subjects every common carrier by railroad engaging in interstate commerce to liability to employees injured as a result of the carrier's negligence. State Courts have concurrent jurisdiction with Federal Courts in FELA suits. 45 U.S.C. § 56.

Issue One: The Court held that the language *"every* co.mon carrier by railroad in interstate commerce" was all embracing, and indicated Congress' intent that State owned railways be included within its terms. Accordingly, the Court read FELA to authorize Federal suits against State owned railways.

Issue Two: Having decided that FELA authorizes such suits, the Cour: then held that Congress had the *power* to abrogate a State's immunity, stating "the States surrendered a portion of their sovereignty when they granted Congress the power to regulate commerce." 377 U.S. at 191, 84 S.Ct. at 1212, 12 L.Ed.2d at 239.

[2-4] Thereafter, in *Welch v. State Department of Transportation*, 483 U.S. 468, 107 S.Ct. 2941, 97 L.Ed.2d 389 (1987), the Court overruled the first holding of *Parden* to the extent that it "is inconsistent with the requirement that an abrogation of Eleventh Amendment immunity by Congress must be expressed in *Unmistakably clear* language . . . " 483 U.S. at 478, 107 S.Ct. at 2948, 97 L.Ed.2d at 399 [Emphasis supplied].[3] Accordingly, absent such

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[3] The Eleventh Amendment provides:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

U.S. const. amend. XI.

This amendment also bars suits in Federal Court against a citizen's own state. *Hans v. Louisiana*, 134 U.S. 1, 10 S.Ct. 504, 33 L.Ed. 842 (1890). However, the Eleventh Amendment does not bar suits against a State in State Court. *See, Nevada v. Hall*, 440 U.S. 410, 99 S.Ct. 1182, 59 L.Ed.2d 416 (1979).

language, the Eleventh Amendment bars FELA suits in Federal Court.[4]

The issue remains, however, whether a State may, nonetheless, be subjected to FELA liability in *State* Courts. The recent U.S. Supreme Court decision in *Will v. Michigan Dept. of State Police*, 491 U.S. ___, 109 S.Ct. 2304, 105 L.Ed.2d 45 (1989), is dispositive of that issue.

Will involved a 42 U.S.C. § 1983 suit brought against the State of Michigan in a Michigan State Court. The Court stated:

> If Congress intends to alter the usual Constitutional balance between the States and the Federal government, it must make its intention to do so unmistakably clear in the language of the statute. *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 105 S.Ct. 3142, 87 L.Ed.2d 171 (1985) . . . *Atascadero* was an Eleventh Amendment case, but a similar approach is applied in other contexts. Congress should make its intention 'clear and manifest' if it intends to pre-empt the historic powers of the States (citation omitted).

491 U.S. at ___, 109 S.Ct. at 2308, 105 L.Ed.2d at 54.

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[4] *Welch* explicitly left open the second holding of *Parden*, i.e., Congress' power to abrogate Eleventh Amendment immunity. This issue was recently resolved in *Pennsylvania v. Union Gas*, 491 U.S. ___, 109 S.Ct. 2273, 105 L.Ed.2d 1 (1989) in which the Court stated that Congress' "power to regulate commerce includes the power to override State's immunity from suit, but *we will not conclude that congress has overridden this immunity unless it does so clearly.*" 491 U.S. at ___, 109 S.Ct. at 2281, 105 L.Ed.2d at 16 (Emphasis supplied). Accordingly, the fact that Congress has the *power* to override immunity is irrelevant unless it has, in fact, done so in unmistakably clear language.

Accordingly, in *Will*, after finding that § 1983 did not contain language unmistakably subjecting States to liability, the Court stated "we cannot accept petitioner's argument that Congress intended nevertheless to create a cause of action against States to be brought in State Courts . . . " 491 U.S. at ___, 109 S.Ct. at 2309, 105 L.Ed.2d at 55.

Welch makes manifest the absence in FELA of the requisite "unmistakably clear language." As in *Will*, we find no rationale to subject States to FELA liability in State Courts, when Congress has expressed no intent to so subject them in Federal Court.

AFFIRMED.

GREGORY, C.J., and HARWELL, FINNEY and TOAL, JJ., concur.

APPENDIX E

STATE OF SOUTH CAROLINA COUNTY OF CHARLESTON KENNETH HILTON, Plaintiff, vs. SOUTH CAROLINA PUBLIC RAILWAYS COMMISSION, Defendant.	)	IN THE COURT OF COMMON PLEAS CASE NO. 88-CP-10-705 ORDER

THIS MATTER is before the Court upon Plaintiff's Motion for Reconsideration of Order of Dismissal of FELA claim, or in the alternative, for Certification of said Claim under Rule 54(b), dated November 8, 1988. Plaintiff's Motion was supported by a Memorandum of Law filed with the Motion. Defendant filed a Memorandum of Law in Opposition dated November 21, 1988 and a Supplemental Memorandum dated November 23, 1988. The parties have agreed upon the Court's resolution of the issue upon the briefs without necessity of a hearing.

MOTION FOR RECONSIDERATION

Plaintiff first argues that this Court erred in "finding" that the State of South Carolina has not consented to FELA liability. Contrary to Plaintiff's argument, there was no such "finding," nor did the Court go outside the record in addressing this issue. Plaintiff failed to allege the State's consent in his Complaint. The Court rejects this ground for the requested reconsideration.

Plaintiff goes on to argue, as its sole alternative ground for reconsideration, that in empowering the South Carolina Public Railways Commission "to sue and be sued" the General Assembly waived the Commission's sovereign immunity and subjected the Commission to FELA liability. Plaintiff urges, quite correctly, that the General Assembly is presumed to know the law. However, it has long been the law in South Carolina that empowering a state agency to sue and be sued is, "not intended as a waiver of the immunity of [the state agency] from tort liability and does not have that effect." *Graham v. Charleston County School Board*, 262 S.C. 314, 317, 204 S.E.2d 384 (1974); *Boyce v. Lancaster County Natural Gas Authority*, 266 S.C. 398, 223 S.E.2d 769 (1976); *Rice Hope Plantation v. South Carolina Public Service Authority*, 216 S.C. 500, 59 S.E.2d 132 (1950); and *Sherbert v. School District No. 85, Spartanburg County*, 169 S.C. 191, 168 S.E. 391 (1932). Thus, the legal affect of the "sue and be sued" language, knowledge of which the General Assembly is presumed to have had, establishes just the converse of that which Plaintiff urges. At the time the General Assembly empowered the South Carolina Public Railways Commission to sue and be sued it did so knowing that such language would not amount to a waiver of sovereign immunity from actions, such as this one, seeking to impose tort liability upon an instrumentality of the State of South Carolina.

This Court has carefully considered Plaintiff's arguments and authorities and, upon reconsideration, adheres to the views expressed in its prior Order.

ENTRY OF JUDGMENT UNDER S.C.R.C.P. 54(b)

Plaintiff also seeks, by way of alternative relief, an Order pursuant to S.C.R.C.P. 54(b) directing entry of a final judgment against Plaintiff as to the FELA cause of action. Defendant initially opposed a separate entry of judgment but in its Supplemental Memorandum Defendant assented to the requested entry of judgment provided that an Order be issued staying any further litigation of the claims presented by Plaintiff in his Amended Complaint. This Court believes that it is in the best interests of all concerned that the purely legal question of the applicability of the FELA to this Defendant be heard at the appellate level. At the same time, however, no interests of justice or of judicial economy are served by having this matter proceed in the appellate courts and in the trial court simultaneously. There being no just reason for delay it is

ORDERED that Plaintiff's Motion for Reconsideration be denied; and it is

FURTHER ORDERED that judgment in favor of Defendant and against Plaintiff on his Complaint be immediately entered; and it is

FURTHER ORDERED that the remainder of this action be and the same is hereby stayed pending further order of this Court.

AND IT IS SO ORDERED.

/s/ Ellis B. Drew
Ellis B. Drew
Judge, Tenth
Judicial Circuit

ANDERSON, S.C.
December 7, 1988

ATTEST: A TRUE COPY
HOWARD A. TAYLOR (SEAL)
CLERK
By David Alston
DEPUTY CLERK

APPENDIX F

STATE OF SOUTH CAROLINA COUNTY OF CHARLESTON KENNETH HILTON, Plaintiff, vs. SOUTH CAROLINA PUBLIC RAILWAYS COMMISSION, Defendant.	)	IN THE COURT OF COMMON PLEAS CASE NO. 88-CP-10-705 ORDER FILED NOV 3 1988

THIS MATTER is before the Court upon Defendant's Motion to Dismiss filed April 4, 1988. A hearing was had on July 14, 1988 with the parties appearing through counsel. Plaintiff was represented by Donald B. Clark, Esquire, of the Charleston Bar and by R. J. Beckham, Esquire of the Florida Bar who was admitted to practice before the Court *pro hac vice*, and Defendant was represented by Keating L. Simons, III, Esquire, of the Charleston Bar. The Court invited the submission of briefs by the parties and after consideration of same, together with the arguments advanced by counsel at the hearing, the Court reaches the conclusions hereinafter stated.

STATEMENT OF FACTS

The Defendant South Carolina Public Railways Commission is a statutory creation and an agency of the State of South Carolina. Section 58-19-10, *et seq.*, Code of Laws of South Carolina (1976). The Complaint makes no allegations to the contrary and alleges that Defendant is engaged as a common carrier in interstate commerce by railroad. Plaintiff goes on to allege that he was injured

while in the course and scope of his employment duties with Defendant and, as a consequence, is entitled to monetary relief from Defendant pursuant to the FELA.

For purposes of Defendant's S.C.R.C.P 12(b)(6) Motion to Dismiss, the Court assumes as true the facts that Defendant is a common carrier engaged in interstate commerce by railroad and that Plaintiff was injured while about the course and scope of his duties with Defendant railroad. However, the Court must accept as fact the proposition that Defendant is an agency or instrumentality of the State of South Carolina and it is on that ground that Defendant bases the instant Motion.

INTRODUCTION

For many years the FELA has been applied to state-owned railroads. The dominant case on this issue was *Parden v. Terminal Railway*, 377 U.S. 184, 12 L.Ed.2d 233, 84 S.Ct. 1207, Reh. Den. 377 U.S. 1010, 12 L.Ed.2d 1057, 84 S.Ct. 1903 (1964). *Parden* held that the FELA applied to state-owned railroads and that the Eleventh Amendment did not bar an FELA action against a state-owned railroad in federal court. However, on June 25, 1987, the United States Supreme Court overruled *Parden* in *Welch v. State Dept. of Highways and Public Trans.*, 483 U.S. ___, 97 L.Ed.2d 389, 107 S.Ct. 2941 (1987). In *Welch*, which involved a seaman's relief under the Jones Act, the court held that the language, "any seaman who shall suffer personal injury in the course of his employment," found in Section 33 of the Jones Act, was not unmistakable statutory language sufficient to authorize a Jones Act suit against a state in federal court.

Since the *Welch* decision a number of FELA cases against state instrumentatalities have been dismissed by federal courts for lack of jurisdiction. *See e.g., Rockwell v. New Jersey Transit Rail Operations, Inc.*, 682 F. Supp. 280 (D.N.J. 1988); *Laughinghouse v. North Carolina Ports Railway Comm.*, 679 F. Supp. 537 (E.D.N.C. 1988); *Fitchik v. New Jersey Transit Rail Operations, Inc.*, 678 F. Supp. 465 (D.N.J. 1988); and, *Dykman v. New Jersey Transit Rail Operations, Inc.*, 685 F. Supp. 79 (S.D.N.Y. 1988). In fact, this particular case was first filed in the United States District Court for the District of South Carolina, Charleston Division, but was dismissed after the *Welch* decision and subsequently brought in this Court.

In *Welch* the State of Texas advanced the argument that the Jones Act did not afford state employed seamen a remedy. However, the Supreme court found it unnecessary to address this issue having disposed of the matter on jurisdictional grounds. *Welch*, 97 L.Ed.2d at 398, n. 6. Likewise, the Federal District Court cases cited just above do not address the contention advanced by Defendant here, that FELA does not apply to state-owned railroads. Insofar as research efforts of the parties or of this Court have determined, no reported decision on this substantive issue exists and this would appear to be a matter of first impression.

QUESTIONS PRESENTED

1. Under the Federal Employer's Liability Act may a railroad worker employed by a state bring an action against the state for money damages for personal injury in the course of his employment when Congress has not

unequivocally expressed its intention to authorize an action for money damages against the state?

DISCUSSION

The Eleventh Amendment is in effect a jurisdictional bar. The Amendment states:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

U.S. Const. Amend. 11.

While this is the only reference to sovereign immunity in the United States Constitution, it is established without question that the amendment simply broadened the sovereign immunity of the states which already existed in the United States as to their own state courts. *Welch v. State Department of Hwys. and Pub. Trans.*, 780 F.2d 1268, 1270 (5th Cir. 1986), *aff'd*, 483 U.S. ___, 97 L.Ed.2d 389, 107 S.Ct. ___ 1987); *Hans v. Louisiana*, 134 U.S. 1, 10 S.Ct. 504, 33 L.Ed. 842 (1890); *Edelman v. Jordan*, 415 U.S. 651, 94 S.Ct. 1347, 39 L.Ed.2d 662 (1974).

It may appear that this question was answered in *Parden v. Terminal Railway*, 377 U.S. 184, 12 L.Ed.2d 233, 84 S.Ct. 1207, Reh. den. 377 U.S. 1010, 12 L.Ed.2d 1057, 84 S.Ct. 1903 (1964). However, that decision has been severely limited by subsequent decisions of the Supreme Court.

Parden held that the Eleventh Amendment did not bar an FELA action against a state owned railroad in

federal court. There, the core of the Supreme Court's holding was:

> *It remains the law that a state may not be sued by an individual without its consent.* Our conclusion is simply that Alabama, when it began operation of an interstate railroad *approximately twenty years after enactment* of the FELA, necessarily consented to such suit as was authorized by that Act.

Parden, 12 L.Ed.2d 233, 240. (Emphasis Added)

The holding of *Parden* has by subsequent decisions been all but expressly overturned.

The basis for the decision in *Parden* has been modified by the Supreme Court to such an extent that it is no longer good law. The holding in *Parden* should therefore not be followed. *Faust v. South Carolina State Hwy. Dept.*, 721 F.2d 934, 940 (4th Cir. 1983).

Whether or not a state may be sued in state court under FELA involves two distinct questions. The first is has Congress through express language abrogated the state's sovereign immunity under the Eleventh Amendment. The second is has the state through express language waived its sovereign immunity to be sued. In the present case Congress has neither abrogated South Carolina's immunity under the FELA statute nor has South Carolina waived its sovereign immunity to be sued under FELA.

In *Edelman v. Jordan*, 415 U.S. 651, 39 L.Ed.2d 662, 94 S.Ct. 1347 (1974), the Court held:

> The mere fact that a state participates in a program through which the Federal Government provides assistance for the operation by

> the state of a system of public aid *is not sufficient to establish consent on the part of the state* to be sued in the Federal Courts.

Edelman, 39 L.Ed.2d 662, 679. (Emphasis Added).

The Court in further modifying the "consent" holding of *Parden* stated:

> In deciding whether a state has waived its Constitutional protection under the Eleventh Amendment, we will find waiver only where stated "by the most express language or by such overwhelming implications from the text as [will] leave no room for any other reasonable construction." (Citing: *Murray v. Wilson Distilling Company*, 213 U.S. 151, 171, 53 L.Ed. 742, 29 S.Ct. 458 (1909).)

Edelman, 39 L.Ed.2d 662, 678.

In *Employees v. Missouri Public Health Dept.*, 411 U.S. 279, 36 L.Ed.2d 251, 93 S.Ct. 1614 (1973), the Court attempted to distinguish the *Parden* holding. However, their distinction was rather weak. The Court stated:

> The history and tradition of the Eleventh Amendment indicate that by reason of that barrier a federal court is not competent to render judgment against a non-consenting state. *Parden* involved the railroad business which Alabama operated "for profit."

Employees, 36 L.Ed.2d 251, 256.

The *Employees* decision involved a Fair Labor Standards Act suit by state employees. In that case the Supreme Court held that Missouri enjoyed sovereign immunity from suit in federal court by its employees seeking recovery under the Act. The Court recognized the question of whether individuals could bring an FSLA

action against the state in state court, however, they never reached the question in their opinion. *Employees*, 36 L.Ed.2d 251, 258.

Garcia v. San Antonio Metropolitan Transit Auth., 469 U.S. 528, 83 L.Ed.2d 1016, 105 S.Ct. 1005 (1985), involved the application of the federal minimum wage to state employees. There the Court held that applying the federal minimum wage requirements to a state run mass transit authority which received substantial federal aid was not destructive of the state sovereignty or violative of any constitutional provision. *Garcia*, 83 L.Ed.2d 1016, 1036.

The *Garcia* Court relied heavily on the fact that mass transit authorities operated by states receive substantial federal aid, thus the employees should also receive the benefits of the federal minimum wage requirements. The Court stated:

> In short, Congress has not simply placed a financial burden on the shoulders of states and localities that operate mass-transit systems, but has provided substantial countervailing financial assistance as well, *assistance that may leave individual mass-transit systems better off than they would have been had Congress never intervened at all in the area.*

Garcia, 83 L.Ed.2d 1016, 1036-7. (Emphasis Added)

The holding in that case by analogy would seem to apply FELA liability to the states. However, FELA is strictly a liability statute and not a regulatory statute as is FLSA. The Court on many occasions has distinguished between prospective relief granted to plaintiffs and relief which would allow a plaintiff to obtain a retroactive

monetary award which would be paid out of the state treasury. *Employees*, 36 L.Ed.2d 251, 258; *Welch*, 96 L.Ed.2d 389 n. 6 at 398.

In *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 87 L.Ed.2d 171, 105 S.Ct. 3142 (1985) the Court addressed the question of whether states and state agencies are subject to suit in federal courts by litigants seeking retroactive monetary relief under § 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794.

The Court there reaffirmed the *Edelman* requirement that a state will be deemed to have waived its sovereign immunity only by the most express language. *Atascadero*, 87 L.Ed.2d 171, 178. As to whether Congress had abrogated the state's constitutional immunity in enacting the Rehabilitation Act the Court stated:

> Congress may abrogate the state's constitutionally secured immunity from suit in Federal Court only by making its intention *unmistakably clear in the language of the statute.*

Atascadero, 87 L.Ed.2d 171, 179. (Emphasis Added)

The Plaintiffs in *Atascadero* brought forth the argument that when Congress said "any recipient of federal assistance" that included the states since they were recipients of federal assistance. This is applicable here because FELA is worded as "every common carrier." The Court in addressing that argument stated:

> There is no claim here that the state of California is not a *recipient of federal aid under the statute.* But given their constitutional role, *the states are not like any other class* of recipients of federal aid. *A general authorization for suit in federal court is not the kind of unequivocal statutory language sufficient to abrogate the Eleventh Amendment.* When Congress chooses to subject the states to federal jurisdiction, it must do so specifically. (Citing: *Pennhurst II*, 465 U.S 89, 79 L.Ed.2d 67, 104 S.Ct. 900, Citing *Quern v. Jordan*, 440 U.S. 332, 59 L.Ed.2d 358, 99 S.Ct. 1139 (1979).)

Atascadero, 87 L.Ed.2d 171, 182.

It seems clear that from the Court's holding in *Atascadero* that the general language such as "any recipient of federal assistance" or "every common carrier" is insufficient to authorize suit in federal court under a federal statute. Therefore, the language in FELA is obviously not the specific language which the Supreme Court requires by Congress to abrogate the state's Eleventh Amendment immunity. And, therefore, should not be considered sufficient to abrogate a state's sovereign immunity.

Finally, in *Welch v. Dept. of Hwys. & Pub. Trans*, 483 U.S. ___, 97 L.Ed.2d 389, 107 S.Ct. ___ (1987), the Court held that the Jones Act did not authorize a seaman employed by a state to sue the state in federal court. The Court reiterated that Congress may abrogate the state's constitutionally secured immunity from suit in federal court only by making its intention unmistakably clear in the language of the statute. *Welch*, 97 L.Ed.2d 389, 395.

The Court further stated that it will find a waiver by the state only where stated by the most express language or by such overwhelming implications from the text as will leave no room for any other reasonable construction. *Welch*, 97 L.Ed.2d 389, 396. Further the Court stated that Congress had not expressed "in unmistakable statutory

language" its intention to allow states to be sued in federal court under the Jones Act. *Welch*, 97 L.Ed.2d 389, 398.

Therefore the plaintiff could not maintain an action against the state in federal court under the Jones Act.

More recently in *Rockwell v. New Jersey Transit Rail Operations, Inc.*, 682 F. Supp. 280 (D.N.J. 1988), the Court held that an action against a state under the Federal Employer's Liability Act (FELA) in federal court would not lie and was dismissed for lack of subject matter jurisdiction. The Court there stated that since Congress in neither the Jones Act nor FELA had set forth a clear and unmistakable intent to abrogate a state's Eleventh Amendment immunity the federal court could not entertain the suit. *Rockwell*, 682 F.Supp. at 283.

It seems clear that the Court has moved away from its consent argument in *Parden* in these subsequent cases. Now to allow a suit in federal court against a state the Court requires unequivocal language in the statute on the part of Congress to express the congressional intent to abrogate the state's immunity, or express language on the part of the state to waive its sovereign immunity.

The doctrine of sovereign immunity should apply as to whether a federal statute may be used to create a cause of action against the state by an individual in state court. Since the Supreme Court requires such express language to abrogate a state's Eleventh Amendment immunity it only seems appropriate that the same express language would be required by the Court to abrogate the state's sovereign immunity. If a state is not subject to suit in federal court without the express intention of Congress

under a federal statute, then the state should, as well, not be subject to suit in its own courts without the same express language.

Although several Supreme Court cases come close to the issue, no case has yet decided the question of whether an individual could maintain an FELA or Jones Act cause of action against a state in state court. The Court in *Welch* stated in a footnote:

> Because Eleventh Amendment immunity "partakes of the nature of a jurisdictional bar," (Citing *Edelman v. Jordan*) we have no occasion to consider the state's additional argument that Congress did not intend to afford seamen employed by the states a remedy under the Jones Act.

Welch, 97 L.Ed.2d 389, n.6 at 398.

Basically, the question of whether a state employee could maintain an action against a state under FELA in state court is a matter of first impression.

The case of *Mathewes v. Port Utilities Commission*, 32 F.2d 913 (D.S.C. 1929), held that a state owned railroad was liable under FELA. However, the reasoning applied in that case has been patently abandoned by the Supreme Court. There, the district judge relied on the language "every common carrier" to include state owned railroads. Obviously, the Court in *Atascadero* required much more than a general expression to abrogate a state's Eleventh Amendment immunity. Therefore, the holding and reasoning of *Mathewes* is no longer applicable. *Atascadero*, 87 L.Ed.2d 171, 182.

Since the State of South Carolina has not consented to FELA liability, and since Congress has not unequivocably expressed an intent to subject states to FELA liability, FELA does not apply to this Defendant.

Accordingly, Plaintiff has failed to state a claim against this Defendant upon which relief can be granted. It may be, however, that Plaintiff can demonstrate an entitlement to relief apart from FELA. Therefore, it is

ORDERED that the Complaint be, and it is hereby, dismissed but with leave to Plaintiff to file and serve an Amended Complaint within ten days of the date hereof if he be so advised. Defendant shall have ten days following service of such an Amended Compliant to respond thereto. In the event Plaintiff fails to file an Amended Complaint within the time allowed hereunder the Clerk is directed to forthwith enter judgment in favor of Defendant.

AND IT IS SO ORDERED.

/s/ Ellis B. Drew, Jr.
Ellis B. Drew, Jr.
Presiding Judge

ANDERSON, S.C.

October 31, 1988

ATTEST A TRUE COPY
HOWARD A. TAYLOR (SEAL)
CLERK

By David Alston
DEPUTY CLERK

APPENDIX G

STATE OF SOUTH CAROLINA COUNTY OF CHARLESTON	)	IN THE COURT OF COMMON PLEAS
KENNETH HILTON, Plaintiff, vs.	)	CASE NO. 88-CP-10-705
SOUTH CAROLINA PUBLIC RAILWAYS COMMISSION, Defendant.	)	MOTION TO DISMISS

TO: WM. EARL HIGGINBOTHAM, ESQUIRE, BECKHAM, MCALILEY & SCHULZ, P.A. AND TO DONALD B. CLARK, ESQUIRE, ROSEN, ROSEN & HAGOOD, ATTORNEYS FOR PLAINTIFF:

PLEASE TAKE NOTICE that the Defendant, South Carolina Public Railways Commission, through its undersigned attorneys, will move before the Presiding Judge, Ninth Judicial Circuit, at such place and time as the Court may appoint, for an Order dismissing the within action pursuant to S.C.R.C.P. 12(b)(6) on the grounds that the Complaint fails to state facts sufficient to constitute a cause of action.

PLEASE BE PRESENT TO DEFEND IF SO MINDED.

/s/ Keating L. Simons
Keating L. Simons, III
HOLMES & THOMSON
100 Broad Street
Post Office Box 1090
Charleston, S.C. 29402
(803) 722-1634

ATTORNEYS FOR DEFENDANT

CHARLESTON, S.C.

April 4, 1988

STATE OF SOUTH CAROLINA COUNTY OF CHARLESTON KENNETH HILTON, Plaintiff, vs. SOUTH CAROLINA PUBLIC RAILWAYS COMMISSION, Defendant.	IN THE COURT OF COMMON PLEAS CASE NO. 88-CP-10-705 CERTIFICATE OF MAILING

The undersigned, Attorneys for Defendant, hereby certify that on the 4th day of April, 1988, a copy of the attached Motion to Dismiss was placed in an envelope with first-class postage, prepaid, and mailed to Wm. Earl Higginbotham Esquire, Attorney for Plaintiff, at his last known address, Beckham, McAliley & Schulz, P.A., Suite 3131, Independent Square, One Independent Drive, Jacksonville, Florida 32202 and to Donald B. Clark, Rosen, Rosen & Hagood, 45 Broad Street, Post Office Box 893, Charleston, South Carolina 29402.

/s/ Keating L. Simons
Keating L. Simons, III
HOLMES & THOMSON
100 Broad Street
Post Office Box 1090
Charleston, S.C. 29402
(803) 722-1634

ATTORNEYS FOR DEFENDANT

CHARLESTON, S.C.

April 4, 1988

APPENDIX H

STATE OF SOUTH CAROLINA COUNTY OF CHARLESTON KENNETH HILTON, Plaintiff, vs. SOUTH CAROLINA PUBLIC RAILWAYS COMMISSION, Defendant.	IN THE COURT OF COMMON PLEAS C/A NO: 88-CP-10- COMPLAINT

Plaintiff, KENNETH HILTON, sues Defendant, SOUTH CAROLINA PUBLIC RAILWAYS COMMISSION (COMMISSION), and alleges:

1. This is a civil action arising under Chapter 45 U.S.C. § 51, *et seq.*

2. At all times material hereto, the Defendant owned and operated a common carrier railroad engaged in interstate commerce, with its principal place of business at Charleston, Charleston County, South Carolina, and Plaintiff was an employee of Defendant working in the scope of his employment and in furtherance of interstate commerce.

3. On or about March 2, 1986, at or near the Defendant's shops at East Cooper Berkeley, Charleston, South Carolina, Plaintiff was injured as a result of Defendant's breach of duty when, he was required to manually move, unload and empty excessively heavy drums of water from the rear of Defendant's dumptruck, without adequate, competent co-workers and/or adequate mechanical equipment to assist him. During such process, it was necessary for Plaintiff to position himself on top of said

drums in order to obtain sufficient leverage to cause the drum to overturn so as to allow the water to flow from them out the rear of the dumptruck. During said process, Plaintiff was caused to lose his footing when he suddenly and unexpectedly slipped on water which resulted in his falling backwards from the top of said drums, striking his head and back against the truck body and adjacent drums.

4. At the above time and place, Defendant was negligent in the following acts of commission or omission, each of which contributed to causing Plaintiff's injuries:

(a) In negligently failing to exercise reasonable care to provide Plaintiff with a reasonably safe place to work.

(b) In negligently failing to provide Plaintiff with reasonably necessary tools and equipment in proper repair for the work that Plaintiff was required to do.

(c) In negligently failing to provide Plaintiff with a reasonably adequate number of coemployees and assistants to perform the work assigned to Plaintiff in a reasonably safe manner.

(d) In negligently failing to provide adequate supervision and planning to assure proper assistance, equipment and time for performing the duties required of Plaintiff.

(e) In negligently requiring Plaintiff to manually move, unload and empty said drums which Defendant knew, or reasonably should have known, were excessively heavy for the reasonably safe handling by a single individual.

(f) In negligently requiring Plaintiff to manually move, unload and empty said drums

when the same result could have been achieved by the reasonable and available operation of the dumptruck body.

5. As a result of the foregoing breach of duty, Plaintiff was seriously and permanently injured; among Plaintiff's injuries are injuries to his back, neck, head, nervous system and other injuries not yet diagnosed; and, said injuries and the conditions resulting therefore are continuing in their nature so as to cause Plaintiff injury, pain and disability, which will reasonably be expected to continue in the future.

6. As a result of the foregoing breach of duty, Plaintiff suffered injuries and damages, including loss of earnings, medical expenses, personal inconvenience, aggravation of a pre-existing injury and mental and physical pain and suffering due to the injuries to Plaintiff's body and nervous system, plus an inability to lead a normal life. These injuries are permanent, and in the future Plaintiff will suffer loss of wages, loss of earning capacity and medical expenses, personal inconvenience and mental and physical pain and suffering, plus an inability to lead a normal life.

WHEREFORE, Plaintiff demands judgment against the Defendant for damages in such sum as may be proved at the trial of this matter, interest on the judgment as provided by law, and for the costs of this action.

Plaintiff requests trial by jury.

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No. 90-848

In The

Supreme Court of the United States

October Term, 1990

KENNETH HILTON,

Petitioner,

v.

SOUTH CAROLINA PUBLIC RAILWAYS COMMISSION,

Respondent.

Petition For Writ Of Certiorari To The Supreme Court Of The State Of South Carolina

BRIEF IN OPPOSITION

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RESTATED QUESTION PRESENTED

1. May an employee of a state-owned railroad sue his employer for money damages under the Federal Employees Liability Act (FELA) even though Congress has not clearly and unequivocally expressed an intent that FELA apply to the states?

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STATEMENT OF THE CASE

The State of South Carolina, through its South Carolina Public Railways Commission ("Commission"), operates a railroad. The Commission is an agency or instrumentality of the State of South Carolina. S.C. Code Ann. § 58-19-10, *et seq.* (Law Co-Op. 1976). Petitioner was injured in the course of his employment with the Commission. Invoking the Federal Employees Liability Act, 45 U.S.C. § 51 *et seq.* ("FELA"), Petitioner brought an action against the Commission in the United States District Court. Following the decision in *Welch v. Texas Dept. of Public Highways and Public Trans.*, 483 U.S. 468, 107 S. Ct. 2941, 97 L. Ed. 2d 389 (1987), Petitioner voluntarily dismissed that action and refiled his claim in state court in South Carolina.

The Commission moved to dismiss on the grounds that a FELA claim could not be maintained against a state in state court, an issue left open by this Court in *Welch*, 483 U.S. at 476, 107 S. Ct. at 2955, 97 L. Ed. 2d at 398. The trial court dismissed the complaint and granted leave to Petitioner to amend to assert other available remedies. (Pet. Br., App. F). Petitioner appealed to the South Carolina Supreme Court. That Court affirmed, holding that FELA did not apply to state owned railroads. The Court based its decision on this Court's decisions in *Welch* and *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 109 S. Ct. 2304, 105 L. Ed. 2d 45 (1989).

SUMMARY OF ARGUMENT

The decision of the South Carolina Supreme Court should be affirmed. An unequivocal expression of congressional intent to apply a federal statute to a state is required to preserve federalism. Requiring that congressional intent be clearly stated in a proposed statute puts all on notice as to if and how proposed legislation would affect the states. Only then can our political system properly assess and balance state and federal interests. States would otherwise be left without protection against the whims of the federal legislative process. *Garcia v. San Antonio Metro Transit Authority*, 469 U.S. 528, 105 S. Ct. 1005, 83 L. Ed. 2d 1016 (1985). Congressional authority to subject states to FELA is not at issue here. The issue is whether Congress has clearly stated an intent that FELA apply to the states. The search for that intent yields no unequivocal expression regarding the states. Nothing about the act suggests Congress ever thought about, much less deliberately considered, applying FELA to the states. The general language "common carrier by railroad" does not provide specific notice to the states, nor does it provide evidence of specific congressional intent to subject states to FELA liability.

REASON WHY CERTIORARI SHOULD NOT BE GRANTED

1. THE SUPREME COURT OF THE STATE OF SOUTH CAROLINA CORRECTLY INTERPRETED THE DECISIONS OF THIS COURT THAT AN UNEQUIVOCAL EXPRESSION OF CONGRESSIONAL INTENT IS REQUIRED TO SUBJECT STATES TO FEDERAL LEGISLATION UNDER THE COMMERCE CLAUSE.

A. The Clear Statement Rule Ensures That States Will Be Protected From Over-Reaching of the Federal Government.

As Professor Tribe eloquently states:

> By making a law unenforceable against the states unless a contrary intent is apparent in the language of the statute, the clear statement rule would further ensure that attempts to limit state power would be unmistakable, thereby structuring the legislative process to allow the centrifugal forces in Congress the greatest opportunity to protect the states' interest. Thus a recognition of the peculiar institutional competence of Congress in adjusting federal power relationships makes this an appropriate and useful approach to reconciling national power with state litigational immunity.

L. Tribe, *American Constitutional Law*, § 3-37 at 140 (1978).

Other courts have also expressed the need for unequivocal expression of congressional intent.

> *Garcia* concludes that the primary limit on this [federal] power is the political process of state participation in federal decision making. If this process is to have its force, legislation that is meant to affect states must say so; states will then be aware of proposed federal legislation perceived to intrude into their operations, and

> will be able to draw their political weapons. But if legislation is silent or half-heartedly ambiguous as to its effects on states, and a court later declares that it applies to states, the process would have been skewed and the state would have been effectively sandbagged. The result would be a sidestepping of the structural protections outlined in *Garcia* and the return of the judges from the sidelines.

Welch v. State Dept. of Highways and Public Transportation of the State of Texas, 780 F.2d 1268, 1275-76 (5th Cir. 1986) (Higgenbottom, P., concurring) *aff'd*, 483 U.S. 468, 107 S. Ct. 2941, 97 L. Ed. 2d 389 (1987).

A clear statement both protects the states and keeps the federal courts out of the business of making policy. The clear statement rule would prevent the national government from "devouring the essentials of state sovereignty." *Garcia*, 469 U.S. at 579, 105 S. Ct. at 1032, 83 L. Ed. 2d at 1052 (Powell, J. dissenting opinion). The concepts of federalism upon which *Garcia* certainly rests require that federal statutes be construed to exclude states unless Congress expressly indicates otherwise. "If a federal statute does not recite its applicability to states, the inquiry should end." *Welch*, 780 F.2d at 1275 (Higgenbottom, P., concurring).

As this Court's recent decision in *Welch* clearly points out, the Constitutional role of states sets them apart from other employers and defendants. *See also, Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 246, 105 S. Ct. 3142, 87 L. Ed. 2d 171, 182 (1985); *Edleman v. Jordan*, 415 U.S. 651, 673, 94 S. Ct. 1361, 39 L. Ed. 2d 664, 679 (1974); *Employees v. Missouri Dept. of Public Health & Welfare*, 411 U.S. 279, 283, 93 S. Ct. 1614, 36 L. Ed. 2d 251, 257 (1973). A state's

constitutional interest in immunity encompasses both whether it may be sued and where it may be sued. *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 98-99, 104 S. Ct. 900, 79 L. Ed. 2d 67 (1984). This Court has already addressed the "where" question in requiring clear and unambiguous language to abrogate Eleventh Amendment immunity.[1] It is only logical that the Constitutional interest a state has in whether it may be sued at all would likewise require a clear and unequivocal statement.

Eleventh Amendment immunity is not the only immunity enjoyed by the states. Both the Tenth Amendment[2] and the very nature of our federal system of government establish constitutionally based immunities. *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 109 S. Ct. 2304, 105 L. Ed. 2d 45 (1989). *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 105 S. Ct. 1005, 83 L. Ed. 2d 1016 (1985). One well established immunity is that a state cannot be sued without its consent. *Will*, 491 U.S. at ___, 109 S. Ct. at 2310, 105 L. Ed. 2d at 56.

This Court's Eleventh Amendment Jurisprudence also argues for applying the clear statement rule to decide the substantive "whether" question. This Court

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[1] The Eleventh Amendment provides: The judicial power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against one of the United States by citizens of another state or by citizens or subjects of any foreign state. U.S. Const., amend. XI.

[2] The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people. U.S. Const., amend. X.

has noted on several occasions that a formal indication of Congress' intent to abrogate the states' Eleventh Amendment immunity insures that Congress has not imposed significant burdens on the states without careful thought. *Welch v. Texas Dept. of Highways and Public Transportation*, 483 U.S. 468, 107 S. Ct. 2941, 97 L. Ed. 2d 389 (1987). *Quern v. Jordan*, 440 U.S. 332, 99 S. Ct. 1139, 59 L. Ed. 2d 358 (1979). *Hutto v. Finney*, 437 U.S. 678, 98 S. Ct. 2565, 57 L. Ed. 2d 358 (1978). *Employees of Dept. of Public Health and Welfare, Missouri v. Dept. of Public Health and Welfare, Missouri*, 411 U.S. 279, 93 S. Ct. 1614, 36 L. Ed. 2d 251 (1973).

The protections afforded by the aforementioned cases would be of little value if actions under federal statutes could be brought against states in state court, without an unequivocal expression of congressional intent. The clear statement rule must apply to both the jurisdictional and substantive issues raised when seeking to apply federal enactments to the states.

In *Pennhurst State School & Hospital v. Halderman*, 451 U.S. 1, 16, 101 S. Ct. 1531, 1539, 67 L. Ed. 2d 694, 707 (1981), this Court suggested that a clear statement rule should be used to determine the applicability to the states of federal legislation enacted pursuant to the Fourteenth Amendment. "If Congress intends to impose a condition on the grant of federal monies, it must do so unambiguously." (Citations omitted). "By insisting that Congress speak with a clear voice we enable the states to exercise their choice knowingly, cognizant of the consequences of their participation." *Id.*, 451 U.S. at 17, 101 S. Ct. at 1540, 67 L. Ed. 2d 707.

In *Will*, this Court noted that *Atascadero* was an Eleventh Amendment case, but that similar approaches should be applied in other contexts. "Congress should make its intention 'clear and manifest' if it intends to preempt the historic powers of the states." *Will*, 491 U.S. at ___, 109 S. Ct. 2308, 105 L. Ed. 2d at 54; *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230, 67 S. Ct. 1146, 91 L. Ed. 1447 (1947). Furthermore,

> In traditionally sensitive areas, such as the legislation affecting the federal balance, the requirement of a clear statement assures that the legislature has, in fact, faced, and intended to bring into issue, the critical matters involved in the judicial decision.

Will, 491 U.S. at ___, 109 S. Ct. at 2308, 105 L. Ed. 2d at 54. (Quoting) *U.S. v. Bass*, 404 U.S. 336, 349, 92 S. Ct. 515, 30 L. Ed. 2d 488 (1971).

In *Will*, this Court affirmed that the scope of the Eleventh Amendment is a consideration in deciphering congressional intent as to the scope of 42 U.S.C. § 1983. *Id.*, 491 U.S. at ___, 109 S. Ct. 2309, 105 L. Ed. 2d at 55.

There is no logical reason to presume that the scope of the Eleventh Amendment is relevant when determining Congressional intent pursuant to its authority under the Fourteenth Amendment but not when Congress legislates pursuant to its authority under the Commerce Clause. *See, Pennsylvania v. Union Gas*, 491 U.S. ___, 109 S. Ct. 2273, 105 L. Ed. 2d 1 (1989).

This Court, in overruling *National League of Cities*, continues to "recognize that the States occupy a special position in our constitutional system and the scope of Congress' authority under the Commerce Clause must

reflect that position." *Garcia*, 469 U.S. at 556, 105 S. Ct. at 1020, 83 L. Ed. 2d at 1037.

> *National League of Cities*, reflected the general conviction that the Constitution precludes the national government from . . . devouring the essentials of state sovereignty.

Id., 469 U.S. at 547 (quoting), *Maryland v. Wirtz*, 392 U.S. at 205, 88 S. Ct. 2017, 20 L. Ed. 2d 1020 (dissenting opinion).

In short, "[i]t is no novelty to observe that the composition of the Federal Government was designed in large part to protect the states from over-reaching by Congress." *Garcia*, 469 U.S. at 551, 105 S. Ct. at 1017, 83 L. Ed. 2d at 1034.

The dissent in *Garcia* feared that the majority was subjecting the states to unlimited Congressional action, "reduc[ing] the Tenth Amendment to meaningless rhetoric." *Id.*, 469 U.S. at 560, 105 S. Ct. at 1022, 83 L. Ed. 2d at 1040 (Powell, J. dissenting opinion). The majority in *Garcia* found unworkable the traditional government function test as laid out in *National League of Cities* because of the difficulty of describing what is a traditional government function in the context of an ever-changing society. *Id.*, 469 U.S. at 546, 105 S. Ct. at 1015, 83 L. Ed. 2d at 1031. This Court, by requiring a clear statement from Congress in its enactments affecting the states would be creating a balance in which the historical and constitutional position of states and the federal government is preserved. Such a rule would be the most logical solution to the tension created by *Garcia*.

B. The Language "Every Common Carrier by Railroad" Is Not A Sufficiently Unequivocal Expression Of Congressional Intent to Subject States to the FELA.

The language "every common carrier" as employed in the FELA falls short of satisfying the ordinary rule of statutory construction that "if Congress intends to alter the usual constitutional balance between the states and the federal government," it must make its intention to do so "unmistakably clear in the language of the statute." *Will v. Michigan Dept. of State Police*, 491 U.S. ___, 109 S. Ct. 2308, 105 L. Ed. 2d 45, 54 (1989). In *Will* this court held that term "person" used in § 1983 does not include states. By overruling *Parden v. Terminal Ry. of Al. Docks Dept.*, 377 U.S. 184, 84 S. Ct. 1207, 12 L. Ed. 2d 233 (1964)[3] this Court determined that the words "every common carrier by railroad" are not sufficiently clear or specific to include states for the purposes of the Eleventh Amendment.[4] The same result must be reached when analyzing whether Congress intended that FELA create a remedy against states at all.

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[3] The *Parden* Court failed to distinguish between a private employer and a state employer as required by a state's constitutional role in the federal system. Having done this, the Court then applied the general language "every common carrier" to the state. Furthermore, *Parden*'s constructive consent theory is no longer good law when associated with the surrender of Constitutional rights. *Edleman v. Jordan*, 415 U.S. 651, 663, 94 S. Ct. 1347, 39 L. Ed. 2d 662 (1974).

[4] *Welch*, 483 U.S. 468, 107 S. Ct. 2941, 97 L. Ed. 2d 389.

C. *Parden* Is No Longer Good Law and the Other Cases Cited by Petitioner do not Address the Issue Presently before the Court.

Petitioner mistakenly relies on *United States v. California*, 297 U.S. 175, 56 S. Ct. 421, 80 L. Ed. 567 (1936), *California v. Taylor*, 353 U.S. 553, 77 S. Ct. 1037, 1 L. Ed. 2d 1034 (1957), and *Parden* for the proposition that FELA applies to state-owned railroads. The *Taylor* Court suggested that because Congress did not expressly exempt railway workers employed by states from the Railway Labor Act, state railway workers were included in the Act. The *Taylor* Court's interpretation of the FELA is of dubious weight as precedent in this situation. *Taylor* stands for the proposition, no longer followed by this Court, that absent excluding language, general language includes state employees.[5]

Petitioner further relies on *United Transportation Union v. Long Island Railroad Co.*, 455 U.S. 678, 102 S. Ct. 1349, 71 L. Ed. 2d 547 (1982) to support its position. In *UTU* the Court applied the Railway Labor Act[6] to the states based on the holding of *National League of Cities*. The Court held that the state-owned railroad in New York was not a traditional government function, and as such, was not immune from federal regulation. Subsequently

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[5] Constitutional role of the states sets state employers apart from other employers and defendant. *Atascadero*, 473 U.S. at 246. *Pennhurst II*, 465 U.S. at 99.

[6] *UTU* does not directly address the issue in question, in that Congress clearly intended the Railway Labor Act to apply to state-owned railroads. 45 U.S.C.A. § 159(a). The question in *UTU* was whether Congress had the power to apply the Act to a state-owned railroad.

this Court in *Garcia* overruled the traditional government function test:

> [T]he states must be equally free to engage in any activity that their citizens choose . . . no matter how unorthodox or unnecessary anyone else – including the judiciary – deems state involvement to be. Any rule of state immunity that looks to the "traditional", "integral" or necessary nature of governmental functions inevitably invites an unelected federal judiciary to make decisions about which state policies it favors and which ones it dislikes.

Id., 469 U.S. at 546, 105 S. Ct. at 1015, 83 L. Ed. 2d at 1030-31.

Finally, Petitioner asserts the recent case of *Port Authority Trans-Hudson Corp. v. Feeney*, 495 U.S. ___, 110 S. Ct. 1868, 109 L. Ed. 2d 264 (1990) supports its proposition that the FELA applies to states. The issue in *Feeney* was whether the "state had waived its Eleventh Amendment immunity to suit in federal court."[7] The Court was not faced with and did not address the applicability of the FELA to a state-owned railroad.

Petitioner claims that the slate is not clean, [Pet. Br. p. 11] and therefore *stare decisis* dictates that FELA as applied to states by *Parden* must be followed. This Court's decisions in *Garcia*, *Welch* and *Will* have all but eliminated any precedential value *Parden* may have. The

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[7] *Feeney* involved an interstate compact that expressly permitted the bi-state corporation to sue and be sued in state and federal court. Four justices were of the opinion that the corporation was not the state and was not entitled to assert the Eleventh Amendment as a jurisdictional bar.

South Carolina Supreme Court correctly reasoned that for lack of a clear statement of applicability to the states in the FELA, Petitioner's remedy against the Commission must be found elsewhere.

CONCLUSION

The states enjoy certain immunities from impermissible encroachments upon their sovereignty by both the legislative and judicial branches of the federal government. Exercise of judicial branch authority affecting state treasuries in derogation of the states' Eleventh Amendment immunity is permissible against a nonconsenting state only upon a clear and unequivocal statement of Congressional intent. There is no reason in logic or policy to suppose that a lesser showing is sufficient to warrant intrusion upon the states by the legislative branch. In enacting the FELA Congress did not specifically or unequivocally express an intent to include states among the class of railroad employers potentially liable for money damages under the Act. Absent the required clear statement, the FELA must be held not applicable to state-owned railroads. The opinion of the South Carolina Supreme court should be affirmed.

Respectfully submitted,

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(3)

No. 90-848

In The

Supreme Court of the United States

October Term, 1990

KENNETH HILTON,

Petitioner,

v.

SOUTH CAROLINA PUBLIC RAILWAYS COMMISSION,

Respondent.

On Writ Of Certiorari To The Supreme Court Of South Carolina

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QUESTIONS PRESENTED FOR REVIEW

1. Does the opinion of the South Carolina Supreme Court in this case conflict with decisions of this Court holding that the federal statutory regulation of this Nation's railroads, including the FELA laws, pervasively pre-empt the field and apply to state-operated railroads?

2. Does a state that voluntarily engages in interstate railroad commerce thereby consent to the applicability of the Federal Employers' Liability Act, 45 U.S.C. §51, *et seq.*?

3. Are the remedies provided by the Federal Employers' Liability Act, 45 U.S.C. §51, *et seq.*, available to employees injured while working in furtherance of interstate commerce for railroads owned and operated by a state?

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CITATION OF OPINIONS BELOW

The opinion of the Supreme Court of South Carolina, relying upon *Freeman v. S.C. Public Ry. Comm.*, 393 S.E.2d 383 (1990) (App. 9),[1] is reported as *Hilton v. S.C. Public Ry. Comm.*, a Memorandum Opinion (App. 7), pursuant to that court's "Rule 23"; we have been unable to find this opinion in the Southeastern (2d) Reporter.[2]

GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

The date of the Opinion of the South Carolina Supreme Court is July 20, 1990 (App. 7). The date of denial of a timely Petition for Rehearing was September 4, 1990 (App. 1). The statutory provision believed to confer jurisdiction on this Court is 28 U.S.C. §1257(a):

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had . . . where any title, right, privilege, or immunity is specially set up or claimed under the Constitution . . . or statutes of . . . the United States.

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[1] All appendix references are to the appendix to the Petition for Writ of Certiorari.

[2] *Freeman* being the only "reported" decision, reference to the language in the Court below will be directed to that decision (393 S.E.2d 383).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Article I, Section 8, Clause 2, of the U. S. Constitution:

> The Congress shall have Power . . . To regulate Commerce with foreign nations and among the several States, and with the Indian Tribes.

45 U.S. Code, Section 51:

> Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.
>
> Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered

> as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter.

STATEMENT OF THE CASE

Plaintiff originally filed his action in the United States District Court. Following the decision in *Welch v. Texas Dept. of Highways and Public Trans.*, 483 U.S. 468, 107 S.Ct. 2941, 97 L.Ed.2d 389 (1987), Plaintiff voluntarily dismissed that action and refiled his claim in the appropriate state court in South Carolina (App. 33). Plaintiff's Complaint there alleged that he was injured while employed by an interstate railroad and that he was entitled to the remedies provided by 45 U.S.C. §51 *et seq*. The Defendant filed a Motion to Dismiss, claiming that the state-operated railroad was not subject to the provisions of the FELA (App. 31). The trial court granted the Motion to Dismiss (App. 19). Plaintiff timely filed a Motion for Reconsideration in the proceeding, but the rehearing was denied by the trial court (App. 15). A timely appeal was then filed in the South Carolina Supreme Court. That Court affirmed (upon the authority of its decision involving the same issue, decided several weeks earlier) the dismissal of Plaintiff's Complaint, holding that the provisions of 45 U.S.C. §51 *et seq*. did not apply to the state-owned railroad (App. 7, 9). A timely Petition for Rehearing (App. 2) was denied by the South Carolina Supreme Court (App. 1). All rulings in the Supreme Court of South Carolina were predicated upon its earlier disposition of a similar case: *Freeman v. South Carolina Public Railways Comm.*, 393 S.E.2d 383 (1990).

SUMMARY OF ARGUMENT

This is *not* an Eleventh Amendment case; it involves *not* the federal judicial power, but the Congressional power to require State courts to entertain FELA actions upon the same substantive basis that governs FELA actions in the federal courts.

Conflict is apparent, and tacitly conceded by the Supreme Court of South Carolina, with *Parden v. Terminal Ry.*, 377 U.S. 184 (1964). Conflict exists with *Welch* also, as well as with other cases involving the FELA. The same needs for uniformity within, and pervasive pre-emption of, the field of rail interstate commerce exist today as were prominent factors in the earlier cases establishing the applicability of the Congressional rail legislation to "all" rail carriers (including those operated by States).

When South Carolina created its Public Railways Commission in 1969, *Parden* had already made it clear that participation in interstate rail commerce would subject the South Carolina operation to the FELA. Whatever sovereign immunity concept the Court may apply here (if *any* is deemed applicable), that immunity can be surrendered or waived by the voluntary action of the State in pursuing activities:

> (a) Squarely within a pervasively regulated sphere of interstate commerce;
>
> (b) Unconnected with any federal grants or fundings; and
>
> (c) For profit, and far beyond the historic governmental activities commonly associated with any immunity concept.

The FELA simply affords an injured employee to be made whole; no penalty or punitive damages are authorized.

The FELA remedy, heretofore available to employees of state railroads, is in jeopardy only if this Court's judicial gloss on the Eleventh Amendment is not:

> (a) Excepted, in light of undeviating precedent, congressional acquiescence and the continuing need for uniform and pervasive regulation of rail interstate commerce; or
>
> (b) Accommodated, by finding that state courts may be required to hear FELA cases even though a federal court would have no jurisdiction – especially in this case where Congress had the explicit authority to subject States to FELA accountability and where the State surrendered or waived any immunity by electing to venture into interstate rail commerce; or
>
> (c) Eliminated, by overruling *Hans v. Louisiana*, or at least restricting its precedential value to its precise holding – thus discarding subsequent expansion of that decision.

ARGUMENT

Introduction

"[T]he Eleventh Amendment does not apply in state courts" *Will v. Mich. Dept. of State Police*, 491 U.S. 58, 63-64 (1989). As recognized by the South Carolina Supreme Court in its *Freeman* opinion, the Amendment "does not bar suits against a State in State Court," 393 S.E.2d at 384 (fn. 3) (App. 12). "The language of the Eleventh Amendment gives us no hint that it limits *congressional* authority;

it refers only to the '*judicial* power' . . . " *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 18 (1989) (Plurality opinion).[3]

[Issue I]

> Does the opinion of the South Carolina Supreme Court in this case conflict with decisions of this Court holding that the federal statutory regulation of this Nation's railroads, including the FELA laws, pervasively pre-empt the field and apply to state-operated railroads?

By recognizing that *Parden* was only partially overruled by *Welch*, indeed that *Welch* "left open the second holding of *Parden*", the South Carolina Supreme Court acknowledged its ruling to be in conflict with *Parden*, 393 S.E.2d at 384 (fn. 4) (App. 13). By ignoring the fact that five members of this Court specifically re-affirmed the viability of a cause of action against states under the Jones Act, (see *e.g.*, concurring opinion of White, J., 483 U.S. at 495) the South Carolina Court ruled contrary to *Welch*. We shan't belabor the conflict issue, but will note our contention that the opinion below is totally at odds with the rationales of *U.S. v. California*, 297 U.S. 175 (1936), *California v. Taylor*, 353 U.S. 553 (1957) and *United Transp. Union v. Long Island R.R. Co.*, 455 U.S. 678 (1982).

We assume the conflict issue provided the most obvious key to unlock the door to this Court's certiorari jurisdiction, but we doubt the wisdom of further argument on this self-evident proposition.

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[3] Absolute sovereign immunity exists only where a forum and the source of the statute are identical. *Nevada v. Hall*, 440 U.S. 410, 416 (1979).

[Issue II]

> Does a state that voluntarily engages in interstate railroad commerce thereby consent to the applicability of the Federal Employers' Liability Act, 45 U.S.C. §51, *et seq.*?

Even the Eleventh Amendment's explicit "bar" to federal court jurisdiction may be waived or surrendered by a state. *Clark v. Barnard*, 108 U.S. 436 (1883).

It is no surprise, therefore, that any claimed immunity with *less* than explicit constitutional status may likewise be lost by way of waiver, surrender or consent. *Petty v. Tennessee-Missouri Bridge Comm.*, 359 U.S. 275 (1959); *Parden v. Terminal Ry. of Al. Docks Dept.*, 353 U.S. 553 (1957).

By Act No. 456, effective July 14, 1969, the South Carolina Public Railways Commission was created; simultaneously the South Carolina State Ports Authority was directed to "transfer to the commission its common carrier Class 2 switching operations that are currently under the jurisdiction of the Interstate Commerce Commission." The South Carolina Commission was given the duties to "operate, maintain and control the tractors and equipment transferred to it – and be governed by the rules and regulations of the Interstate Commerce Commission by virtue of the Class 2 certificates issued to the Ports Utilities Commission and the Port Terminal Railroad of South Carolina" (1969 Stat. at Large 810, 812). Those provisions were amended in 1975, to include within the commission's authority "the power to sue and be sued"[4]

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[4] Under South Carolina law, the power to sue and be sued does not constitute a waiver of sovereign immunity for tort actions. See, Order (on Motion for Reconsideration) (App. 16). [Reference to South Carolina laws hereafter will be to the codified provisions.]

(Act No. 232, 1975 Stat. at Large 321, 322). These provisions are now codified in §59-19-10, §59-19-30 and §59-19-40, Code of Laws of South Carolina, 1976.

Coming into the field of interstate rail commerce after *Parden* was the law of the land, South Carolina accordingly has submitted – not to federal judicial power but to the pervasive regulatory ambit of Congress – in two fashions, each of which this Court has acknowledged to be efficacious as a surrender, waiver or consent to yield to federal authority:

> A. By "the plan of the convention" a state's alleged sovereignty may be surrendered.
>
> *Principality of Monaco v. State of Mississippi*, 292 U.S. 313 (1934).
>
> In *Pennsylvania v. Union Gas*, 491 U.S. 1 (1989) the ratification of the Commerce Clause was held to be an effective surrender to the power of Congress to regulate state action. (Plurality opinion.)
>
> B. In *Parden* the voluntary undertaking of interstate commerce by rail was held to be a consent to federal regulation. (377 U.S. at 192).

After *Parden*, South Carolina was on notice, *ab initio*, that its rail scheme would constitute its consent to coverage by federal law, including the FELA. Accordingly, this case does *not* involve a state "unable directly to remedy a judicial misapprehension" regarding the abrogation of any alleged immunity (*Port Authority Transportation Hudson Corp. v. Feeney*, 495 U.S. at ___, 109 L.Ed.2d at 272). The fact that *Parden* was later overruled, on the issue of federal court jurisdiction, (a "constitutional" issue to be sure) should not, *ipso facto*, negate its precedent relating

to a consent to the laws of the United States regulating rail commerce – a finding (whether "misapprehension" or not) that placed South Carolina on clear notice of the result of its action.[5]

This case does *not* present the scenario before the Court in *Will* (491 U.S. 58, 65):

> (A) Here there are no "historic powers of the States" being pre-empted;
>
> (B) Here there is no imposition of a condition on the grant of federal moneys.

As to any perceived "sensitive areas . . . affecting the federal balance" (491 U.S. at 65) this Court long ago mandated that states yield to federal law in deference to the FELA. The opinion announcing a unanimous decision in *Howlett v. Rose*, ___ U.S. ___, 110 S.Ct. 2430 (1990) is laden with citations of FELA opinions establishing "supremacy" of the federal law and the obligations of states to entertain suits brought under those laws (___ U.S. ___, 110 S.Ct. at 2439-2442). [The FELA has been the "most fertile source of Supreme Court decisions construing the duty of state courts to assume their ordinary jurisdiction to enforce federal law in a nondiscriminatory fashion." *Wolcher*, "Sovereign Immunity and the Supremacy Clause: Damages against States in Their Own Courts for Constitutional Violations." 69 Cal. L. Rev. 189, 239 fn. 16 (1981).] These FELA decisions emphasize the reluctance of states to accord supremacy, the machinations

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[5] The various references to the "Interstate Commerce Commission" in the enabling legislation clearly reveal an awareness by South Carolina of the pervasive scope of federal power.

(under the guise of local law) to avoid supremacy and the steadfast insistence by this Court that the Congress has pervasively pre-empted the field to the point where states must provide a forum for FELA cases in all but the rarest of events. *Garcia v. San Antonio Metro. Trans. Authority,* 469 U.S. 528 (1985) recognizes the limits placed upon notions of state sovereignty by the Constitution (at 548-549) and denies the existence of any "license to employ freestanding conceptions of state sovereignty when measuring congressional authority under the Commerce Clause" (at 550).

[Issue III]

> Are the remedies provided by the Federal Employers' Liability Act, 45 U.S.C. §51, *et seq.*, available to employees injured while working in furtherance of interstate commerce for railroads owned and operated by a state?

A.

When last discussed by the Court, five Justices expressly affirmed the existence of a Jones Act/FELA remedy for injured employees of state-operated entities, notwithstanding that the remedy could not be enforced in a federal court, *Welch v. Texas Dept. of Highways & Public Transportation,* 483 U.S. 468 (1987); only one member of the Court apparently disavowed the viability of this remedy (483 U.S. at 496, Scalia J., concurring). Less than a year ago, the Court unanimously ruled that a bi-state agency had consented to federal jurisdiction for the adjudication of rights afforded by the remedial provisions of the Jones Act/FELA. *Port Authority Transportation Hudson Corp. v. Feeney,* [PATH] 495 U.S. ___, 109 L.Ed.2d 264

(1990). True, the "remedy" aspect was not addressed directly in *PATH,* but its solid reliance upon *Petty v. Tennessee-Missouri Bridge Comm.,* 359 U.S. 275 (1959) casts the *PATH* decision in a light most favorable to the holding in *Petty* that the federal law applied to states (indeed the *PATH* controversy would have been moot absent the *applicability* of the Jones Act[6] – unless the court is to be understood as implying that a state did "consent" to be sued under a law that does not apply to the state!). Even more recently, *Parden* has been relied upon for the principle that the Commerce Clause, when implemented by legislation, vitiates any state immunity based upon sovereignty. *Pennsylvania v. Union Gas Co.,* 491 U.S. 1 (1989) (Plurality opinion).

If *Petty* and *Parden* are still viable, (and if *PATH* was not an advisory opinion, or *dicta*) then tension appears inevitable with the statutory construction analysis articulated by the Court in *Atascadero State Hospital v. Scanlon,* 473 U.S. 234 (1985) and its progeny. *See, e.g. Will v. Michigan Dept. of State Police,* 491 U.S. 58 (1989) and *Dellmuth v. Muth,* 491 U.S. 223 (1989). No decision has yet applied the *Atascadero* doctrine to preclude Congress from requiring a state to entertain, *in its own courts,* a cause of action created by the implementation of the Commerce Clause. This precise scenario was envisioned before *Atascadero,* however, in *Employees of Dept. of Public Health & Welfare v.*

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[6] The concluding paragraph of the Court's opinion is broadly couched, stating that *consent* establishes a "waiver of *any* Eleventh Amendment immunity *that might otherwise bar*" PATH's amenability to suit, ___ U.S. at ___, 109 L.Ed.2d at 274 (emphasis supplied).

Missouri, 411 U.S. 279, 298-299 (1973) (Marshall, J., concurring opinion):[7]

> This is not to say, however, that petitioners are without a forum in which personally to seek redress against the State. Section 16(b)'s authorization for employee suits to be brought "in any court of competent jurisdiction" includes state as well as federal courts. See *Iowa Beef Packers, Inc. v. Thompson*, 405 U.S. 2287, 92 S.Ct. 859, 31 L.Ed.2d 165 (1972). As I have already noted, Congress has the power to lift the State's common-law immunity from suit insofar as that immunity conflicts with the regulatory authority conferred upon it by the Commerce Clause. Congress has done so with respect to these state employees in its 1966 amendments to the FLSA; by those amendments, Congress created in these employees a federal right to recover from the state compensation owing under the Act. While constitutional limitations upon the federal judicial power bar a federal court action by these employees to enforce their rights, the courts of the State nevertheless have an independent constitutional obligation to entertain employee actions to enforce those rights. See *Testa v. Katt*, 330 U.S. 386, 67 S.Ct. 810, 91 L.Ed. 967 (1947). See also *General Oil Co. v. Crain*, 209 U.S. 211, 28 S.Ct. 475, 52 L.Ed. 754 (1908). For Missouri has courts of general jurisdiction competent to hear suits of this character, and the judges of those courts are co-equal partners with the members of the federal judiciary in the enforcement of federal law and the Federal Constitution, see *Martin v. Hunter's Lessee*, 1 Wheat. 304, 339-340,

[7] The majority opinion recognized that, "[a]rguably," state court jurisdiction would lie so as to avoid the existence of "a right without any remedy", but restricted its consideration solely to "judicial power" of federal courts. 411 U.S. at 287.

> 4 L.Ed. 97 (1816). Thus, since federal law stands as the supreme law of the land, the State's courts are obliged to enforce it, even if it conflicts with state policy, see *Testa v. Katt, supra*, 330 U.S., at 392-394, 67 S.Ct. at 813-815; Second Employers' Liability Cases, 223 U.S. 1, 57-58, 32 S.Ct. 169, 178, 56 L.Ed. 327 (1912).
>
> I see our decision today, then as nothing more than a regulation of the forum in which these petitioners may seek a remedy for asserted denial of their rights under FLSA. At first blush, it may seem hypertechnical to say that these petitioners are entitled personally to enforce their federal rights against the State in a state forum rather than in a federal forum. If that be so, I think it is a hypertechnicality that has long been understood to be a part of the tension inherent in our system of federalism.

Id. 411 U.S. at 298-299, 93 S.Ct. at 1625.

Granted, *Will* is a case involving state court jurisdiction over a federally-created cause of action; it dealt with federal law derived from the Fourteenth Amendment, however, whereas we now deal with law promulgated under the commerce power. [We again emphasize that our case does *not* involve the judicial power of the United States, and that *Will* specifically tells us "the Eleventh Amendment does not apply in state courts", 491 U.S. at 64.] This difference in the source of federal power is highlighted by *Will's* concern over the "historic powers of the States" or the conditional "grant of federal moneys" (491 U.S. at 65). Also, see *Employees*, 411 U.S. at 284-285, emphasizing the non-"proprietary" aspect of state functions involved there, and distinguishing *Parden* as a situation of "dramatic circumstances" in which a "rather isolated state activity" was conducted *for a profit*.

Employees further recognized the appropriate result of *Parden:* "to make a state employee whole" (491 U.S. at 286). Kenneth Hilton can only be "made whole" if this Court preserves his cause of action, in state court, against his employer. He is specifically excluded from the South Carolina worker's compensation laws ["This title shall not apply to railroads, railroad employees . . . " § 42-1-350] as well as from the South Carolina Tort Claim law [§ 15-78.20] that only became effective "forward in prospective fashion" on July 1, 1986 [Hilton was injured in March, 1986]. By virtue of FELA supremacy in the field of interstate rail operations the South Carolina "little FELA" [§ 58.17-3720] is of no moment. Little doubt exists that this plight stems primarily from the universal understanding that FELA exclusively applies to Kenneth Hilton and his fellow employees.

Significantly, however, by permitting *some* tort suits against the state, South Carolina now must accept FELA cases against the state, *Testa v. Katt*, 330 U.S. 386 (1947). Also, see *Howlett*.

B.

> This Court is forever adding new stories to the temples of constitutional law, and the temples have a way of collapsing when one story too many is added.
>
> *Douglas v. City of Jeannette*, 319 U.S. 157, 181 (1943) (separate opinion, Jackson, J.)

If additional dimension is to be given the "temple" of *Hans v. Louisiana*, 134 U.S. 1 (1890), an edifice surely "leaning" perilously if not "collapsing", we urge two alternative blueprints:

(i) Except from the rigid requirements of *Atascadero* and *Will* those cases (like this one) where preceding decisions by this Court have squarely ruled upon the precise issue that a remedy does exist; or

(ii) Accommodate the statutory construction concept by holding that the remedy does exist where

> (a) Congress had the unquestioned power to subject states to a cause of action under the commerce power, and
>
> (b) a state (at least a state on notice of judicial interpretation that Congress has implemented the power to subject a state to a federally-created remedy) voluntarily engages in a pervasively regulated activity.

i

Stare decisis is preserved by acknowledging the continuing viability of *United States v. California, California v. Taylor, Petty, Parden, Welch* – and yes, *PATH*, as to "supremacy."

While we note the reluctance of the Court to overrule *Hans* because to do so would imperil numerous other subsequent decisions (*Welch*, 483 U.S. at 483-484, fn. 27), repudiation of the previous holdings construing the applicability of federal rail legislation would likewise not only leave injured workers remediless under the Jones Act/FELA but also would jeopardize the uniformity required to effectuate the goals of numerous statutes utilizing similar language as to the scope of applicability, including:

45 U.S.C. § 1-22 (Safety Appliance Acts)
45 U.S.C. § 23 (Boiler Inspection Act)
45 U.S.C. § 61-65 (Hours of Service Law)
45 U.S.C. § 71-73 (Animal Transit Law)
45 U.S.C. § 151-163 (Railway Labor Act)
45 U.S.C. § 231 (Railroad Retirement Act)
45 U.S.C. § 351-367 (Railroad Unemployment Act)
45 U.S.C. § 421-445 (Railroad Safety Act)

The state-operated railroads frequently serve the ports of this Country (*e.g., Parden*) and the South Carolina line before this Court is likewise involved. Recall that the state conveyed to the Public Railways Commission all of the operation previously conducted by the "port" railroad (*supra*, p. 7-8). Imagine the "parade of horribles" that would result from removal of a vital port operation from the provisions of the Railway Labor Act, for example, and the disastrous ripple effect of dismantling this comprehensive regulatory plan is obvious. [Each of the "safety" laws is specifically incorporated into the remedy of Jones Act/FELA, 45 U.S.C. §§ 53, 54. Also, see *Kernan v. American Dredging Co.*, 355 U.S. 426 (1959).]

Finally, due recognition should be accorded to the apparent acceptance by Congress of this Court's precedents in this field of law. None of the earlier rulings have been addressed by "curative" legislation. This was pointedly accentuated by Justice White's concurrence in *Welch* (483 U.S. at 495) as to the existence of a Jones Act/FELA remedy against state employers. The same acceptance by Congress of this Court's interpretations of FELA damages

has been cited, likewise, as apparent approval and acquiescence, *Monessen Southwestern R. Co. v. Morgan*, 486 U.S. 330, 339 (1988).

ii

To accommodate this case with the post-*Atascadero* scrutiny test, we readily acknowledge our reliance upon the work of Professor Allen K. Easley in his Article, "The Supreme Court and the Eleventh Amendment: Mourning the Lost Opportunity to Synthesize Conflicting Precedents," found at 64 Denver Univ. L. Rev. 485 (1988) [Hereafter "Easley"].[8]

Recognizing a twofold study is required (*Welch*, 483 U.S. at 473), we interpret Justice White's concurring opinion as agreeing that Congress and this Court have answered the "whether" question in favor of applying Jones Act/FELA to the states while at the same time answering the "where" question by precluding such actions *in the federal courts*. The construction of one last story on the "temple" is suggested as a means to accomplish this result without toppling the temple.

Professor Easley postulates separate criteria for the "two distinct levels of congressional intent to be analyzed." (Easley, at 526) The first level is the "intent to abrogate" immunity; the second is the intent to provide a remedy "against consenting states" (Id.). (While we think it would well serve the "balance of federalism" to apply a

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[8] For his part, Professor Easley concedes his interpretation "is based largely" on the works of Professors Field and Fletcher. (Easley at p. 502, fn. 103).

less stringent scrutiny in determining "whether" a remedy exists than that scrutiny utilized in determining "where" that remedy may be enforced, the conceptual approach by Professor Easley is quite capable of being thus transposed if the Court is so inclined; accordingly, we will present the matter as he does.)

The Blueprint

(Easley, pp. 513-517, 524-526)

> Express consent overcomes immunity, independent of congressional authorization.
>
> Express authorization overcomes immunity, independent of state consent.
>
> If neither such consent nor authorization is explicitly stated, then these elements become "dependent variables."
>
> "Dependency" is created, constructively, when a state knowingly enters into a field where Congress has the authority to act *and* has acted towards a class into which the state falls as a result of its voluntary act.

As noted, we think it appropriate to utilize constructive consent whenever determining "whether" a statute applies, thus *never* exacting the same degree of specification needed in the determination as to "where" a suit may be brought. This would accord the Eleventh Amendment, as written, and *Hans*, as to its specific holding, a greater deference than that due to any implied immunity concept.

We acknowledge a reluctance to find "constructive consent" that will overcome the express constitutional limitation on the judicial power of the United States. See

Edelman v. Jordan, 415 U.S. 651, 673 (1974) [expressing concern relating to judicial power ramification]. But we suggest Professor Easley's approach is clearly more palatable as a means to accommodate the power of Congress to require that federally-created causes of action must be entertained in a *state's own courts*.[9]

Easley finds *Parden* to constitute the "minimum standard." By *Welch*, however, this Court has stated that "implicit" statutory language will not suffice to authorize the federal courts to assume jurisdiction over a state. A majority of the Court, however, did find an adequate basis for saying the breadth of the statute encompassed state activity in interstate commerce. Also, see *Union Gas*.

C.

Elimination of *Hans* from our jurisprudence may be the best answer. At the same time, we think our case can survive the *holding* in *Hans* (which we perceive to be: there is no federal court jurisdiction over a state that is sued by one of its citizens on a "federal question" cause of action). We here seek only to require a state to appear in its own courts in response to a "federal question" cause of action. As articulated, the holding of *Hans* is inapplicable. It is the gloss attached to *Hans* that gives

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[9] This Court has recognized the need for access to each forum, particularly where – because of other factors – federal jurisdiction may not exist. *Maine v. Theiboutot*, 448 U.S. 1, 11 fn. 12 (1990); a state may not impose barriers to the enforcement of federal legislation in state court where no such barrier exists in federal court. *Howlett v. Rose*, ___ U.S. ___, 110 S.Ct. 2430 (1990); Also, see *Nevada v. Hall*, 440 U.S. 410 (1979).

rise to the twin-headed monster known as today's Eleventh Amendment. If the amplification of *Hans* into a "sovereign immunity" concept is eliminated, and the precedent properly limited to the arena of judicial power, we believe the result will be far more beneficial.

We have no new authorities or theories to advance on the wisdom of abandoning all or a portion of *Hans* and its gloss. The Eleventh Amendment cases in this Court from *Atascadero* to date, with their plethora of opinions and recitation of authorities, brilliantly demonstrate the problem and the need for one of the solutions we suggest.

Indeed, others of the Court may now join in Justice Scalia's observation in *Union Gas*, that 'tis "[b]etter to overrule *Hans*, I should think, than to perpetuate the complexities that it creates" (491 U.S. at 36, dissenting opinion).

CONCLUSION

The decision of the Supreme Court of South Carolina should be reversed, and this matter remanded for trial in the state courts of South Carolina.

Respectfully submitted,

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FILED
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No. 90-843

In The

Supreme Court of the United States

October Term, 1990

KENNETH HILTON,

Petitioner,

v.

SOUTH CAROLINA PUBLIC RAILWAYS COMMISSION,

Respondent.

On Writ Of Certiorari
To The Supreme Court
Of South Carolina

BRIEF ON THE MERITS BY RESPONDENT

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RESTATED QUESTION PRESENTED

May an employee of a State-owned railroad sue his employer in state court for money damages under the Federal Employers' Liability Act (FELA) even though Congress has not clearly and unequivocally expressed an intent that FELA apply to the States?

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SUMMARY OF ARGUMENT

The State of South Carolina, through its Public Railways Commission, has been sued for money damages in a South Carolina court, by a South Carolina citizen, on a claim arising under a federal statute enacted pursuant to the Commerce Clause. The statute purports to reach "every common carrier by railroad" but makes no mention of States as defendants. Federal Employers Liability Act, 45 U.S.C. § 51 (1981). This Court has already ruled that a state is immune from a FELA claim in federal court because Congress did not clearly express an intent that States be subject to FELA claims in federal court.[1] This case, like *Will v. Michigan*, was brought in state court; the Eleventh Amendment is not, therefore, directly applicable.[2] The question left open in *Welch* and now before the Court, is whether Congress created a money damages remedy against the States enforceable against a State in her own courts.

The teaching of *Hans v. Louisiana*,[3] that States are Constitutionally clothed with attributes of sovereign immunity apart from the precise language of the Eleventh Amendment or limits on federal judicial power, though much debated, remains the law today. There is a more general Constitutional dimension to sovereign immunity which is as much deserving of protection as is the States' specific Eleventh Amendment immunity from suit in

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[1] *Welch v. Texas Department of Public Highways and Public Transportation*, 483 U.S. 468 (1987).

[2] *Will v. Michigan Department of State Police*, 491 U.S. 58 (1989).

[3] 134 U.S. 1 (1890)

federal court. Whenever a State is made answerable to an individual for money damages upon a federally created cause of action, an abrogation of the State's immunity has occurred, regardless of whether the State is required to appear in a federal court, or any court of its own creation. When Congress sets out to abrogate the States' Eleventh Amendment immunity from suit in federal court, it must do so with clear, unambiguous language in the text of the statute itself.[4] There is no distinction between these Constitutionally recognized immunities which would justify differing standards of Congressional clarity to abrogate one or the other.

If FELA is to apply to state-owned railroads, it must be that Congress has the Constitutional power under the Commerce Clause to create a money damages remedy against the States, and the Congress has exercised that power with sufficient clarity to enable this Court to be certain of Congress' intent. Although the Constitutional power of Congress in this context is open to some question[5], it is not necessary that the Court revisit the power debate to resolve this case. The South Carolina Public Railways Commission assumes, but does not concede, that Congress has the Constitutional authority to subject it to the FELA.[6] This Court need only go so far as

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[4] *Dellmuth v. Muth*, 491 U.S. 223 (1989); *Welch v. Texas Department of Public Highways and Public Transportation*, 483 U.S. 468 (1987); *Atascadero State Hospital v. Scanlon*, 473 U.S. 234 (1985).

[5] *See, Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 29 (1989) (Scalia, J., dissenting).

[6] *See, Garcia v. San Antonio Metro Transit Authority*, 469 U.S. 528 (1985); *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989).

to hold that an exercise of this assumed Constitutional power on the part of Congress must be accompanied by a clear and unequivocal expression of Congressional intent. There being no such expression of intent in the text of the FELA, the decision of the South Carolina Supreme Court that the FELA does not apply to a state owned railroad should be affirmed.[7]

We believe that this case presents an opportunity for this Court to adopt a straightforward rule:

> A State will not be subject to suit in its own courts on a federally created cause of action for money damages unless Congress clearly and unequivocally expresses its intent, in the text of the statute, that the States be among the class of potential defendants envisioned by the statute.

Such a rule would be a simple corollary to now settled principles of Eleventh Amendment immunity. This formulation is suggested by, and consistent with the language in, several recent decisions of this Court, including *Will v. Michigan*, *Pennsylvania v. Union Gas*, *Dellmuth v. Muth* and *Howlett v. Rose*[8]. Most importantly, the principle we propose would best accommodate the inevitable tension between Congress' Commerce Clause authority to regulate and continuing need to respect the special and independent role of States in our federal system.

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[7] *Welch* should be regarded as dispositive on the question of whether the FELA contains a clear statement of legislative intent to include the States among the class of possible defendants. In any event, neither Petitioner nor his Amicus make any argument to the contrary.

[8] 496 U.S. ___, 110 S.Ct. 2430 (1990)

In *Garcia v. San Antonio Metropolitan Transit Authority*[9], this Court again grappled with Congressional power vis-a-vis the sovereign interests of the several States and concluded:

> In short, the Framers chose to rely on a federal system in which special restraints on federal power over the States inhered principally in the workings of the National Government itself, rather than in discreet limitations on the objects of federal authority. State sovereign interests, then, are more properly protected by procedural safeguards inherent in the structure of the federal system than by judicially created limitations on federal power.

Garcia, 469 U.S. at 552.

If, as *Garcia* teaches, a State's only protection from federal Commerce Clause encroachment upon its sovereignty is the political process, it follows that the Constitutional role of this Court, at a minimum, is to see that the political machinery has addressed the question at hand. Requiring Congress to clearly state its intent in unequivocal terms in the statute itself ensures that the national legislature, after clear notice to the States, has specifically chosen to exercise Commerce Clause authority over the States.

The rule we offer for this Court's consideration would, we believe, preserve and protect the fundamental principles of federalism without erecting an unreasonable or insurmountable barrier to the enforcement of the clearly stated will of Congress.

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[9] 469 U.S. 528 (1985).

ARGUMENT

The Framers believed that sovereign immunity of the States was so clear that the doctrine needed no special expression in the Constitution.[10] The Constitution likewise makes no mention of sovereign immunity for the Federal Government. The Framers never expected or intended sovereign immunity of either the States or the Federal Government to be abolished. Sovereign immunity had long been the law. It was understood that it was part of the textural background on which the Constitution was based.[11] *Chisholm v. Georgia*, 2 U.S. 419 (1793) upset

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[10] "The Court's decision in *Hans v. Louisiana*, [citations omitted], offers impressive authority for the principle that the States as such were regarded by the Framers of the Constitution as partaking of many attributes of sovereignty quite apart from the provisions of the Tenth Amendment. . . . [T]his Court, after canvassing the understanding of the Framers of the Constitution and the controversial decision in *Chisholm*, unanimously concluded that such an action would not lie saying:

> It is not necessary that we should enter upon an examination of the reason or expediency of the rule which exempts a sovereign State from prosecution in a court of justice at the suit of individuals. This is fully discussed by writers on public law. It is enough for us to declare its existence.

Fry v. United States, 421 U.S. 542, 557 (1975) (Rehnquist, J., dissenting) (quoting *Hans v. Louisiana*, 134 U.S. at 21).

[11] "[T]he Eleventh Amendment was important not merely for what it said but for what it reflected: a consensus that the doctrine of sovereign immunity, for States as well as for the Federal Government, was part of the understood background against which the Constitution was adopted, and which its

(Continued on following page)

expectations by showing that the Court was willing to construe Article III expansively. The Eleventh Amendment restored the pre-*Chisholm* understanding that the courts could not displace State sovereign immunity. The Eleventh Amendment is simply a Constitutional exemplification and extension of State sovereign immunity to the federal courts. *Pennsylvania v. Union Gas Co.*, 491 U.S. at 38 (1989) (citing *Ex Parte New York*, 256 U.S. 490 (1921)).

Hans did not rely on the express language of the Eleventh Amendment to reach its result.[12] Instead, the Court relied on a broader notion of State sovereign immunity, observing that "[i]t is inherent in the nature of

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jurisdictional provisions did not mean to sweep away." *Pennsylvania v. Union Gas Co.*, 491 U.S. at 31-32 (Scalia, J., dissenting). "Sovereign immunity is a common-law doctrine that long predates our Constitution and the Eleventh Amendment, although it has, of course, been carried forward in our jurisprudence." *Employees v. Missouri Public Health Dep't*, 411 U.S. 279, 288 (Marshall, J., concurring).

[12] "[I]t was not the Eleventh Amendment by its terms which justified the result in *Hans*, it is not the Tenth Amendment by its terms that prohibits congressional action which sets a mandatory ceiling on the wages of all state employees. Both Amendments are simply [evidence] of the understanding of those who drafted and ratified the Constitution that the States were sovereign in many respects, and that although their legislative authority could be superseded by Congress in many areas where Congress was competent to act, Congress was nonetheless not free to deal with a State as if it were just another individual or business enterprise subject to regulation." *Fry v. United States*, 421 U.S. 542, 557 (1975) (Rehnquist, J., dissenting).

sovereignty not to be amenable to the suit of an individual without its consent. This is the general sense and the general practice of mankind; and the exemption, as one of the attributes of sovereignty, is now enjoyed by the government of every State in the Union." *Hans*, 134 U.S. at 13 (quoting *The Federalist*, No. 81 (A. Hamilton)). *Hans* recognized a Constitutional principle of the sovereign immunity of the States not limited to the federal forum:

> It may be accepted as a point of departure unquestioned . . . that neither a State nor the United States can be sued as defendant in any court in this country without their consent, except in the limited class of cases in which a State may be made a party in the Supreme Court of the United States by virtue of the original jurisdiction conferred on this Court by the Constitution.

Hans, 134 U.S. at 16 (quoting *Cunningham v. Macon & Brunswick R.R.*, 109 U.S. 446, 451 (1883)). No case has held that State courts have an obligation to hear a claim that is barred in the federal courts by the Eleventh Amendment.[13] While States may be required to enforce a federal cause of action in their own courts, *Testa v. Katt*, 330 U.S. 386 (1947), it has not been so held where the sovereign immunity of the States is in question.[14]

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[13] In *Employees* this Court noted, but specifically declined to reach, this issue. 411 U.S. at 287. The Court also specifically declined to reach a similar question in *Welch*. 483 U.S. at 476.

[14] Respondent has not raised sovereign immunity as an affirmative defense to an otherwise applicable cause of action, nor have the South Carolina courts declined jurisdiction based on any claimed valid excuse. Cf. *Howlett v. Rose*, 496 U.S. ___,

(Continued on following page)

The States' rights of sovereign immunity and of immunity from suit in federal court share a common history and development and are difficult to distinguish. What is clear is that the sovereign immunity of the States has long been accepted and continues to be recognized by this Court. *Will*, 491 U.S. at 67. In *Will* this Court reaffirmed, "[t]he principle is elementary that a State cannot be sued in its own courts without its consent." *Id.*

This Court has noted on several occasions that a formal indication of Congress' intent to abrogate the States' Eleventh Amendment immunity when acting pursuant to its plenary powers ensures that Congress has not imposed significant burdens on the States without careful thought. *Welch v. Texas Dep't of Highways and Public Transp.*, 483 U.S. 468 (1987); *Quern v. Jordan*, 440 U.S. 332 (1979); *Hutto v. Finney*, 437 U.S. 678 (1978); *Employees v. Missouri Public Health Dep't*, 411 U.S. 279 (1973).

At a minimum, it is clear that a general authorization for suit in federal court is not sufficient to create a cause of action for money damages enforceable against a State in federal court. *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234 (1985). *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89 (1984). Rather, there must be an unequivocal expression of Congressional intent. *Atascadero*, 473 U.S. at

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110 S. Ct. 2430 (1990). The FELA is not applicable to the South Carolina Public Railways Commission because Congress has not clearly stated an intent that States be included among the class of potential defendants.

240 (1985). Congress must express its intention in the statute itself. *Dellmuth v. Muth*, 491 U.S. at 223 (1989).

This Court has already determined that the language of the FELA is not sufficient to abrogate the States' immunity to suit in federal court. *Welch*, 483 U.S. at 476. The ultimate issue in this case is whether the language of the FELA is nevertheless sufficient to subject States to suit in their own courts on a cause of action not cognizable in federal court. This question, in turn, depends upon whether the clear statement rule of *Atascadero, Welch, Dellmuth*, and other cases, applies with equal force to abrogation of sovereign immunity as well as Eleventh Amendment immunity, an issue upon which this Court has not yet clearly ruled.

This Court's Eleventh Amendment jurisprudence argues for applying the clear statement rule to decide the substantive question of whether the State may be sued at all.[15] Insofar as our research has disclosed, this Court has never differentiated sovereign immunity from Eleventh Amendment immunity in any way which suggests that an abrogation of one, but not the other, need be clearly stated. In fact, the Court's language in several recent cases would certainly lead one to conclude that these two immunities stand on an equal footing.

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[15] "A State's Constitutional interest in immunity encompasses not merely whether it may be sued, by where it may be sued." *Pennhurst State School and Hospital v. Halderman*, 465 U.S. at 99. A State's constitutional interest in whether it may be sued is at least as deserving of clear statement protection as its interest in where it may be sued.

The Court in *Will* implies, but does not go so far as to hold, that a Congressional clear statement of intent is necessary to create a money damages cause of action enforceable against the States in their own courts. The Court referred to the "unmistakably clear in the language of the statute" requirement of *Atascadero* and stated that the scope of the Eleventh Amendment is a consideration in deciphering Congressional intent as to the scope of 42 U.S.C. § 1983. *Will*, 491 U.S. at 66.[16] However, the Court also employed other means to examine Congressional intent, thereby suggesting that the absence of a clear statement in § 1983 was not necessarily dispositive.

Similarly, *Pennsylvania v. Union Gas* hints at a rule requiring a clear statement to create a money damages remedy against the States. The plurality opinion, authored by Justice Brennan, refers to the need to "first decide whether [the federal statute at issue] clearly expresses an intent to hold States liable in damages for conduct described in the statute." 491 U.S. at 7. The plurality concluded that the statutes in question "together convey a message of unmistakable clarity" that "Congress intended that States be liable along with everyone else for clean-up costs recoverable under CERCLA." 491 U.S. at 8. We are fully prepared to conclude that the omission of the words "in federal court" from the quoted passages was not inadvertent. However,

[16] The Court also cited the "clear and manifest" formulation of *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218 (1947), as further support for the general proposition that a clear statement is required for Congress to encroach upon the powers of the States.

given that the case was in federal, rather than state, court[17], and given Justice Brennan's oft and clearly stated views on the relationship between federal power and State's immunities, we are reluctant to rest our case on this language alone.

Dellmuth v. Muth also contains language, broader than necessary to the disposition of that case, which, if read literally, would provide the rule of decision applicable in the instant controversy.

> We now turn our attention to the proper focus of an inquiry into Congressional abrogation of sovereign immunity, the language of the statute. We cannot agree that the textual provisions on which the Court of Appeals relied, or any other provisions of the EHA, demonstrate with unmistakable clarity that Congress intended to abrogate the States' immunity from suit. The EHA makes no reference whatsoever to either the Eleventh Amendment or the States' sovereign immunity.
>
> * * *
>
> We hold that the statutory language of the EHA does not evince an unmistakably clear intention to abrogate the States' Constitutionally secured immunity from suit.

Dellmuth, 491 U.S. at 231-232.

Again, the omission of the words "in federal court" from the quoted passages and the separate references to both Eleventh Amendment and sovereign immunities

[17] The actual holding of the case did refer to actions "in federal court." 491 U.S. at 13.

suggest that "unmistakable clarity" is required for an abrogation of either immunity.

Lastly, and most recently, *Howlett v. Rose* refers to the anomaly presented in the instant case, namely "that a State might be forced to entertain in its own courts suits from which it was immune in federal court . . . " 496 U.S. at ___, 110 S. Ct. at 2436. The anomaly was regarded as

> . . . fully met by our decision in *Will*. *Will* establishes that the State and arms of the State, which have traditionally enjoyed Eleventh Amendment immunity, are not subject to suit under § 1983 in either federal court or state court.

Id.

If this language were to be taken literally, then the case presently before the Court would be easily decided on the basis of a simple rule: a State is not subject to suit in its own courts on a federal law cause of action from which it is immune in federal court. Of course, *Will* did not announce such a rule; it addressed the viability of § 1983 actions against States in state court as a matter of statutory interpretation. However, one could readily analogize the instant case to the holding of *Will*, as described in *Howlett*, and find that an entity with Eleventh Amendment immunity is not a "common carrier by railroad" within the meaning of the FELA.[18]

As the above discussion of *Will*, *Union Gas*, *Dellmuth*, and *Howlett* demonstrates, this Court has all but held that

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[18] According to the court in *Howlett*, the holding of *Will* was that, "an entity with Eleventh Amendment immunity is not a 'person' within the meaning of § 1983." *Howlett*, 496 U.S. at ___, 110 S. Ct. at 2436.

the clear statement rule applies with equal force to abrogation of both Eleventh Amendment and sovereign immunities.[19]

In an analogous context, this Court has declined to find abrogation of a common-law immunity where Congress has not clearly expressed its intention to do so. *Tenney v. Brandhove*, 341 U.S. 367 (1951). In *Tenney*, State legislators were sued under the Civil Rights Act of 1871. The Court cited the long history of legislative immunity and found that the general language of the Civil Rights Act did not evidence Congressional intent to overturn the traditional immunity of legislators.

> We cannot believe that Congress – itself a staunch advocate of legislative freedom – would impinge on a tradition so well grounded in history and reason by covert inclusion in the general language before us.

Tenney, 341 U.S. at 376.

Even though the California legislators were persons and literally within the class of potential defendants, this Court was reluctant to find an abrogation of legislative immunity based on "general language." Legislative immunity, like sovereign immunity, is a doctrine of ancient origin which finds no explicit expression or protection within the Constitution. There is no reason to suppose that clear language is necessary to abrogate the immunity of individual legislators, but not to abrogate immunity of the State they serve.

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[19] The Eleventh Amendment creates or affirms a substantive state right of sovereign immunity. *Mossman v. Donohay*, 46 Ohio St. 2d 1, 16, 346 N.E.2d 305, 314 (1976). In order for the Eleventh Amendment to have any substantive effect, it must be applicable in the state forum as well as the federal one. *Id.*

It is not necessary for this Court to "drop the other shoe" and overrule the holding of *Parden v. Ry.*, 377 U.S. 184 (1964) that the Commerce Clause provides the Constitutional power to abrogate a State's sovereign immunity. But, it is only logical that when Congress exercises this power it must do so in "clear and unmistakable language".

> Although the Supreme Court never has addressed the question whether States may claim immunity in their own courts when the Eleventh Amendment bars suit in federal court, we think that, absent congressional command to the contrary, they may. The *Hans* line of cases indicates that the Constitution was ratified with the implicit assumption that States would retain their sovereign immunity. The only logical interpretation of this implicit constitutional principle is that it must apply regardless of the court in which the State is being sued. Any conclusion to the contrary would decimate the force of the Eleventh Amendment and demote it into nothing more than a choice of forum clause: either the State must consent to be sued in federal court or it will be unwillingly subjected to process in its own courts. We think the Supreme Court's Eleventh Amendment jurisprudence demonstrates a greater respect for the principle of State sovereign immunity.
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> * * *
>
> Although it may be clear that the supremacy clause gives Congress the power to abrogate State court immunity in its own as well as in federal courts, [citation omitted] we think that the Supreme Court's understanding of the principles underlying the Eleventh Amendment would require Congress to use equally explicit language in both circumstances. Because the Supreme Court already has determined that the Jones Act does not abrogate State immunity in federal courts, *see Welch, supra*, we think it cannot be interpreted as abrogating State court immunity.

Morris v. Massachusetts Maritime Academy, 409 Mass. 179, 184-185, 565 N.E.2d 422, 426-27 (1991).

When Congress abrogates a State's immunity from suit in federal court there is no difference between the language required regardless of whether Congress legislates pursuant to the Fourteenth Amendment or the Commerce Clause. The requirement is that the language be "clear and unmistakable."[20] Such language is also required when abrogating a State's immunity in its own courts under the Fourteenth Amendment. *Will, supra*. The only logical conclusion is that the clear statement rule also applies when Congress abrogates a State's sovereign immunity under the Commerce Clause.

The requirement of a "clear statement" or "certainty" serves important Constitutional functions. This Court has explained that members of Congress play a paramount role in protecting the interests of the States from federal encroachment.[21] *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 550-554 (1985). "The requirement that we be

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[20] See *Dellmuth* and *Atascadero* as to the Fourteenth Amendment and *Welch* as to the Commerce Clause.

[21] What can be more invasive than forcing a State court to take jurisdiction of a cause of action under federal law that it could not undertake under State law, and then if the State is successful, to be subject to appear before this Court on appeal because the case involves a federal question? *Mossman*, 46 Ohio St. 2d at 16, 346 N.E.2d at 314 (1976).

'certain' of Congress' intent is designed to prevent us from casually attributing to Congress the intention of imposing on the states the burden of potential liability in suits for money damages." *Matter of McVey Trucking, Inc.*, 812 F. 2d 311, 325 (7th Cir. 1987) *cert. denied*, 484 U.S. 895 (1987).

> *Garcia* concludes that the primary limit on this [federal] power is the political process of state participation in federal decision-making. If this process is to have its force, legislation that is meant to affect states must say so; states will then be aware of proposed federal legislation perceived to intrude into their operations, and will be able to draw their political weapons. But if legislation is silent or half-heartedly ambiguous as to its effect on states, and a court later declares that it applies to states, the process will have been skewed and the states will have been effectively sandbagged. The result would be a sidestepping of the structural protections outlined in *Garcia* and a return of the judges from the sidelines.

Welch v. Texas Dep't of Highways and Public Transp., 780 F.2d 1268, 1275-76 (5th Cir. 1986) (Higginbotham, J., concurring) *aff'd*, 483 U.S. 468 (1987).

A clear statement both protects the States and keeps the federal courts out of the business of making policy. The clear statement rule would prevent the national government from "devour[ing] the essentials of state sovereignty." *Garcia*, 469 U.S. at 579 (Powell, J., dissenting). The concepts of federalism upon which *Garcia* certainly rests require that federal statutes be construed to exclude States unless Congress expressly indicates otherwise. "If a federal statute does not recite its applicability to States,

the inquiry should end." *Welch*, 780 F.2d at 1275 (Higginbotham, J., concurring).

> By making a law unenforceable against the states unless a contrary intent is apparent in the language of the statute, the clear statement rule would further ensure that attempts to limit state power would be unmistakable, thereby structuring the legislative process to allow the centrifugal forces in Congress the greatest opportunity to protect the states' interest. Thus a recognition of the peculiar institutional competence of Congress in adjusting federal power relationships makes this an appropriate and useful approach to reconciling national power with state litigational immunity.

L. Tribe, *American Constitutional Law*, § 3-37 at 140 (1978).

The protections afforded by the Eleventh Amendment clear statement cases would be of little value if actions under federal statutes could be brought against States in state court, without an unequivocal expression of Congressional intent. The clear statement rule must apply to both the jurisdictional and substantive issues raised when seeking to apply federal enactments to the States.[22]

The general language "every common carrier by railroad" as employed in the FELA falls short of satisfying

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[22] It would be odd, indeed, to think that Congress intentionally conferred concurrent jurisdiction on State and federal courts under the FELA, but in doing so, intentionally meant to exclude federal jurisdiction where the State is a defendant, but to allow such suits to go forward in state court. Such a strange interpretation of Congressional intent would serve no purpose but to further confuse the issue of State sovereign immunity.

the requirement that the statute contain clear and unmistakable language to abrogate the States' sovereign immunity in their own courts. By overruling *Parden v. Terminal Ry.*, 377 U.S. 184 (1964), this Court determined that these words are not sufficiently clear or specific to include States. *Welch v. Texas Dep't of Highways and Public Transportation*, 483 U.S. 468 (1987). When Congress has meant to include States, it has done so. The Railway Labor Act specifically refers to "publicly funded and publicly operated" railroads. 45 U.S.C. § 159(a). *See, United Transportation Union v. Long Island R.R.*, 455 U.S. 678, 682 fn. 4 (1982). The only clue as to Congressional intent with respect to the States which is to be found in the text of the FELA suggests that States were not to be included. "Certain specific defenses available to a railroad employer in an employee's personal injury suit were removed, but sovereign immunity was not one of them." *Parden*, 377 U.S. at 199 (White J., dissenting).

Petitioner seemingly does not challenge the proposition that a clear statement of Congressional intent is necessary to create a money damages remedy against the States in their own courts,[23] nor does he suggest that the FELA contains such a statement. Indeed, one examining

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[23] Petitioner's amicus does make an argument that the "unmistakably clear" rule of *Will* is not applicable to this case. However, at bottom, that argument rests upon a distinction between "traditional governmental functions" and commercial or proprietary activities. (Brief of Amicus Curiae, p. 12, fn. 6). The argument is nothing more or less than an offered return to the since rejected approach of *National League of Cities v. Usery*, 426 U.S. 833 (1976). *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985).

Petitioner's brief on the merits searches in vain for the words "clear statement" or any analysis of Congressional intent. Instead, Petitioner offers a consent argument on two fronts. One has never commanded a majority of this Court and the other has been rejected.

Petitioner first argues that "by 'the plan of the convention' a State's alleged sovereignty may be surrendered." (Pet. Br. 8) In support of this proposition Petitioner cites *Principality of Monaco v. State of Mississippi*, 292 U.S. 313 (1934) and *Pennsylvania v. Union Gas*, *supra*. In the former case it is true that this Court observed that by the adoption of the Constitution the States surrendered their sovereignty, at least as to suits against them by the United States or another State. 292 U.S. at 328-329. But the Court held that no such surrender had taken place as against a foreign state, the putative plaintiff in that case. The Court also reaffirmed the holding of *Hans* that the States are immune from suits brought against them by their own citizens. 292 U.S. at 329. *Principality of Monaco* is hardly support for the proposition that Petitioner, a South Carolina resident, may bring a federal claim against the State of South Carolina in her own courts.

Petitioner's citation of *Pennsylvania v. Union Gas* in support of "the plan of the convention" surrender argument is similarly unavailing. In that case five members of this Court concluded that the Commerce Clause grants Congress the power to enact a statute creating a money damages remedy against the States. But only four members of the Court accepted the "plan of the convention"

argument advanced by Justice Brennan.[24] Justice White, the fifth member of the plurality, concurred "in Justice Brennan's conclusion, but not his reasoning." 491 U.S. at 45. That Justice White does not agree that the States surrendered their sovereign immunity by the "the plan of the convention," is demonstrated by his having joined in Justice Powell's opinion in *Welch*, 483 U.S. at 495. Insofar as we are able to determine, the argument advanced by Justice Brennan, and adopted by Petitioner here, has never commanded a majority of this Court. Accepting the proposition offered by Petitioner would be tantamount to overruling *Hans*, a step this Court need not take to properly resolve the present case.

Petitioner also argues, relying on *Parden*, that by voluntarily operating a railroad in interstate commerce, South Carolina has consented to federal regulation. (Pet. Br. 8) This is nothing more than an attempt to breath new life into the constructive consent theory of *Parden* which was rejected in *Welch*, 483 U.S. at 517. The sovereign immunity of the several States is, in light of *Hans* and its progeny, of Constitutional dimension. "Constructive consent is not a doctrine commonly associated with the surrender of constitutional rights." *Edleman v. Jordan*, 415 U.S. 651, 673 (1974).

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[24] The "plan of the convention" argument was briefly outlined in Part III of his opinion, in which Justices Marshall, Blackmun, and Stevens joined. 491 U.S. at 35-36. The argument has been more extensively advanced in other cases. *See, e.g., Welch*, 483 U.S. at 511 (Brennan, J., dissenting); *Atascadero*, 473 U.S. at 248 (Brennan, J., dissenting).

Even if Petitioner's constructive consent or implied waiver theories have survived *Edleman* and *Welch* we believe them to be beside the point. Waiver or consent on the part of a State might be effective to forego a defense to an otherwise applicable federal enactment, but the situation here is far different. The question is whether Congress has created a money damages remedy against the States in derogation of their sovereign immunity, and whether Congress has stated its intention to do so with sufficient clarity to pass Constitutional muster. The State of South Carolina has not asserted sovereign immunity as an affirmative defense to a federal cause of action under which it would be liable but for the defense. If Congress has the Constitutional power to subject States to the liability provisions of the FELA, and if this Court were to determine that Congress clearly exercised its power to do so, then any defensive assertion of sovereign immunity by the States would necessarily fail. *Howlett v. Rose*, 496 U.S. ___, 110 S. Ct. 2430 (1990). The significance of sovereign immunity in the present context lies not in its efficacy as a defense, but in its existence as a Constitutional principle deserving of protection in the form of the clear statement rule. If Congress has the power and has exercised it, the States' consent is unnecessary. If Congress lacks the power, or has not created the remedy, there is nothing to which the State might consent. In either case consent, or lack thereof, is irrelevant.

CONCLUSION

The States enjoy certain immunities from impermissible encroachments upon their sovereignty by both the legislative and judicial branches of the Federal Government. Exercise of judicial branch authority affecting state treasuries in derogation of the States' Eleventh Amendment immunity is permissible against a nonconsenting State only upon a clear and unequivocal statement of Congressional intent. There is no reason in logic or policy to suppose that a lesser showing is sufficient to warrant intrusion upon the States in their own courts at the behest of Congress. In enacting the FELA Congress did not specifically or unequivocally express an intent to include States among the class of railroad employers potentially liable for money damages under the Act. Absent the required clear statement, the FELA must be held not applicable to state-owned railroads. The opinion of the South Carolina Supreme Court to that effect should be affirmed.

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I.

INTRODUCTION

Respondent concedes, as it must, that ordinarily the Supremacy Clause bars "any defensive assertion of sovereign immunity" by a State as "an affirmative defense to a federal cause of action under which it would be liable but for the defense." (Br. 21) *see Howlett v. Rose*, 496 U.S. ___, 110 S. Ct. 2430 (1990). Notably, Respondent does not disagree with the proposition that, read in the light of usual rules of statutory construction, the FELA plainly applies in this case. Respondent does not deny that the South Carolina Public Railways Commission *is* engaging in the business of operating a common-carrier railroad in interstate commerce. Instead, Respondent asks this Court to recognize "a Constitutional principle" (Br. 21) that would require this Court to reject long standing precedent and to read into the word "every" an implicit exception for state-owned railroads because Congress did not couple "every" with the phrase "including state-owned . . . "

Why require such redundancy as a matter of "Constitutional principle?" Respondent invokes *Welch v. Texas Dept. of Highways and Public Trans.*, 483 U.S. 468 (1987), in which this Court held that such elaborately explicit language is necessary before Congress can grant federal district courts jurisdiction to hear FELA claims brought against state government agencies. But *Welch* is an Eleventh Amendment case, and as Respondent and the court below acknowledge, the Eleventh Amendment is inapplicable in suits seeking to enforce federal claims in state courts. Indeed, a close reading of *Welch* itself suggests that a majority of this Court there assumed that FELA

state court jurisdiction survived, in order not to leave injured employees entirely remediless. Why apply Eleventh Amendment jurisprudence here, in a case falling outside the scope of the Eleventh Amendment? Respondent points to *Will v. Michigan Dept. of State Police*, 491 U.S. 58 (1989). In *Will* this Court held that a damages action brought in state court against a state agency, invoking 42 U.S.C. §1983, in fact fell outside the scope of §1983. But *Will* involved the interpretation of the term "person" which, within the larger language of §1983, did not readily encompass a "State." Here there is no such linguistic difficulty.

Obviously, Respondent is not interested in either the actual language of the FELA, the Eleventh Amendment or that of §1983. The key, it thinks, is the idea of state sovereign immunity, a notion Respondent sees as a sort of "brooding omnipresence," escaping all usual boundaries, fundamentally shaping both statutory interpretation and constitutional law. Petitioner does not doubt that respect for state sovereign immunity plays an important role in federal law, indeed sometimes a central role. But this idea, like all others in constitutional law, has its limits. It ought not be pushed to the point of paradox. And that is what Respondent would have this Court do. States *themselves* do not treat sovereign immunity as an absolute principle. Indeed, as Petitioner noted in his brief, South Carolina, since the incident at issue here, has repudiated its prior doctrines of sovereign immunity, opening state courts to suits much like the one in this case. Respondent, however, would add to the rules of statutory construction applicable in construing federal statutes an obligation, seemingly as a matter of constitutional compulsion,

requiring courts interpreting such statutes to, in all cases, treat state sovereign immunity as absolute, absent extraordinary congressional drafting, without regard to how particular states, within their own law, or as a matter of their own administrative practice, approach sovereign immunity questions.

Respondent has no choice, if it is to prevail in this case, but to assert such an extreme proposition. As Petitioner's brief has already indicated, a common sense approach to state sovereign immunity in FELA suits dictates reversal of the decision below.*

II.

RESPONDENT'S CONSENT

Respondent and its supporting *Amici* refuse to address the irrefutable record that establishes the voluntary entry of the Respondent into a regulated field when definitive and explicit interpretations of the federal law *previously* had established the applicability of federal law to any such rail operations conducted by a state. Not only were the explicit decisions of this Court [*U.S. v. California*,

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*We shan't pursue the "conflict" issues; there is no need. Respondent has not cited, much less addressed most of the precedents it seeks to overturn. Totally ignored are this Court's opinions in *U.S. v. California*, 297 U.S. 75 (1936); *California v. Taylor*, 359 U.S. 275 (1959); *Petty v. Tennessee-Missouri Bridge Commission*, 353 U.S. 553 (1957) and, also totally ignored is the majority position in *Welch*, 483 U.S. 468 (1987) (five members of the Court affirmatively validated the application of the Jones Act/FELA to state operations; one member of the Court disagreed, while three other members stated no position).

297 U.S. 75 (1936); *California v. Taylor*, 353 U.S. 553 (1957); *Petty v. Tennessee-Missouri Bridge Comm.*, 359 U.S. 275 (1959); and *Parden v. Terminal Railway*, 377 U.S. 184 (1964)] already on the books when the Respondent state agency entered into rail commerce in 1969, the specific operation of the port railroad in Charleston, South Carolina had been adjudicated by a federal court as falling within the coverage of the FELA. In *Mathewes v. Port Utilities Commission of Charleston, S.C.*, 32 Fed.2d 913 (E.D.S.C. 1929) the district court addressed a common law demurrer premised "on the ground that the action is in tort and that, being municipal corporations, they are not liable for the torts of their agents." (*Id.* at 914). That court noted:

> The question here presented is whether Congress has the power to make a municipality of a state liable for the torts of its agents when it is engaged in interstate commerce; and if it has that power, whether it has done so by the Federal Employers' Liability Act.

The court considered the argument of the railroad that the FELA "although using general terms, should not be construed to include municipalities"; in rejecting that argument, based upon the plain language of the statute, the court concluded, in unassailable logic, that:

> "[e]very reason which could be urged upon Congress for the passage of this act in reference to railroads operated by private capital can be urged with equal force as to railroads operated by municipalities. Congress intended to and did occupy the whole field, and all state laws upon this subject, insofar as they cover the same field, or superseded." *Id.* at 915.

Other courts reached the same conclusion in advance of this Court's opinion in *Parden: Higginbotham v. Public*

Belt Railroad Commission, 188 So. 395 (La. 1939) (rejecting the contention that the FELA had no application to the rail operation "because it is, in fact, being operated by the state itself," 188 So. at 403); *Maurice v. State*, 110 Pac.2d 706 (Cal. App. 1941) (noting that the Safety Appliance Act applied to state railroads and that:

> "[i]t would be a strange situation, indeed, if the state could be held subject to the [Safety Appliance Act] and liable for a violation thereof, and yet could not be sued without its express consent. The state, by engaging in interstate commerce, and thereby subjecting itself to the act, must be held to have waived any right it may have had arising out of the general rule that a sovereign state may not be sued without its consent."
>
> 110 Pac.2d at 711

Respondent postulates a sweeping "straight forward rule." (Br. 3). The following "rule" will determine the precise issue* presented here:

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*Such a rule would satisfy the concern that enables "the states to exercise their choice knowingly, cognizant of the consequences of their participation." *Pennhurst State School & Hospital v. Halderman*, 451 U.S. 1, 17 (1981) [*Pennhurst I*]. Likewise, such rule would accommodate the "clear and manifest" notice of the application of the law. *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 65 (1989). The rule suggested would afford this Court the "perfect confidence" discussed in *Dellmuth v. Muth*, 491 U.S. 223, 231 (1989). Explicitly, it satisfies the "clear notice" sought by Respondent (Br. 4) and its *Amici* (Br. 15-16). After all, when the highest court of the land has stated on four occasions that rail legislation *is* applicable to state operated railroads, and on two occasions has stated that the Jones Act/

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> Where a state voluntarily commences commercial activity that is pervasively regulated by federal law, and such federal law has been explicitly determined to be applicable to such state operations, that state has consented to be governed by the federal law.

Neither Respondent nor its supporting *Amici* cited, much less addressed *Port Authority Trans-Hudson Corp. v. Feeney*, [PATH] ___ U.S. ___, 1105 S. Ct. 1868 (1990);

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FELA, specifically, applies to states, how much more clarity can one expect? South Carolina's awareness of the consequences of its venture is repeated in its statutory enactments (Pet. Br. 7-8). Further recognition of South Carolina's knowing submission to the federal railroad scheme of things is found in its direction that the Respondent comply with the Railway Labor Act (354-3 – 210, S.C. Code).

It cannot be material whether the source of that awareness stems from the language of 45 U.S.C. § 51 itself ("every common carrier") or the interpretation of that language by this Court (*e.g. Petty; Parden; cf., Urie v. Thompson*, 337 U.S. 163, 181-182 (1949), "to read into this all inclusive wording, a restriction . . . would be contradictory to the wording, the remedial and humanitarian purpose, and the constant and established liberal construction of the Act followed by this Court.") – the fact is that South Carolina embarked into interstate rail commerce with the benefit of both sources of "notice." When all the statutory acknowledgments of federal authority are placed in focus, this Court can find *express consent*. See, *PATH, Petty*.

accordingly, the assumption here is that Respondent does not dispute our assessment (Br. 8-11) of that decision.*

Indeed, if consent to jurisdiction can subject a state agency to damages in the federal courts (as *PATH* holds) it would seem axiomatic that the supremacy clause, as interpreted (*e.g., Testa v. Katt*, 330 U.S. 386 (1947) and *Howlett v. Rose*, ___ U.S. ___ 110 S. Ct. 2430 (1990)) precludes states from shielding themselves in their own courts from damages under the same law.

Respondent has actually tripped over its own feet in its dance around the effect of its conduct. It *concedes* that "[w]aiver or consent might be effective to forego a defense to an otherwise applicable federal enactment" (Br. 21) but undoubtedly forgot that this is the *only* rational interpretation of the recent ruling in *PATH*!

III.

THE ELEVENTH AMENDMENT

Even if explicit supremacy principles somehow be sacrificed in favor of a theory of unstated "Constitutional" immunities, South Carolina's train was left at the station. Respondent blithely asserts that the "plan of the

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*We continue to find it inexplicable that this Court could unanimously decide *PATH* without meaning to say that states were subject to the Jones Act/FELA. To ignore the implicit effect of *PATH* is to ignore this Court's policy where mootness is suspected. Because of the "case or controversy" requirement under Article III of the Constitution, this Court will not consider (even by stipulation) moot cases, and, if in doubt, will remand to a lower court for consideration of the mootness issue. *See, e.g., Sosna v. Iowa*, 419 U.S. 393, 398, 402 fn. 12 (1975).

convention" concept has never commanded a majority in this Court. (Br. 19). In addition to dismissing *Monaco v. Mississippi*, 292 U.S. 313 (1934) and in arrogating to itself the determination as to how much of the "reasoning" in the plurality opinion was adopted by Justice White in his concurrence in *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989), the Respondent concededly did not have the prescience to anticipate this Court's opinion in *Blatchford v. Native Village of Noatak* (No. 89-1782, June 24, 1991; 1991 WL 107382 U.S.). We read it to reaffirm the "plan of the convention" doctrine. Respondent brushes off its consent by its voluntary entry into the pervasively regulated rail field by dogmatically asserting that *Welch* precludes any such result. (Br. 20)* Not only does this ignore *U.S. v. California, California v. Taylor, UTU* and *Petty*, it is a misreading of *Welch* as well! The "dissenting" opinion in *Welch* became the majority opinion on the remedial issue.**

**But see* Respondent's concession that *Welch* "specifically declined" to address the issue (Br. 7, fn. 13).

***Indeed, it is not difficult to understand that this Court will require more evidence of intent to abolish the explicit jurisdictional immunity the Eleventh Amendment establishes, but will look to the ordinary rules of construction, in light of the precedents of the Court, in addressing some less-than-explicitly-stated theory of immunity from the reach of the commerce power of the federal government. This is the basis for the assertion in our original brief (at 17-18) suggesting that less stringent scrutiny should be required when determining "whether a remedy is afforded by a federal law than the degree of scrutiny utilized in determining where" that remedy may be

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Accordingly, the concerns enunciated in some of this Court's Eleventh Amendment cases, looking for "clear notice" and seeking to avoid "retroactive" determinations that affect state operations, are simply not matters of concern in this instance. South Carolina had clear notice of the law of the land.

The statutes and practical operations of the rail system of South Carolina are completely congruent with the fundamental federal policy Chief Justice Burger described in *United Transportation Union v. Long Island RR Co.*, 455 U.S. 678 (1982):

> "[T]here is *no justification* for a rule which would allow the states, by acquiring functions previously performed by the private sector, to erode federal authority in areas traditionally subject to federal statutory regulation. Railroads have been subject to comprehensive federal regulation for nearly a century." (emphasis supplied).
>
> 455 U.S. at 687.

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enforced. Strangely, Respondent seeks to avoid the effects of its own legislative mandates and voluntary conduct engaging in interstate rail commerce on the basis of an immunity *not* contained in the Constitution, while this Court has specifically recognized that the mandatory language of the Constitution can be bypassed with the "consent" of a State! Surely, if the filing of a paper in a federal court constitutes "consent" to an explicitly barred exercise of jurisdiction (*Clark v. Barnard*, 108 U.S. 436 (1883)), then the operation of a railroad servicing a major port in this country (pursuant to legislative enactments directing a state to submit to federal laws) evidences a consent to be governed by both those federal laws and their definitive and explicit interpretation by this Court!

As that opinion further explained the basis for such policy:

> "To allow individual states, by acquiring railroads, to circumvent the federal system of railroad bargaining, or any of the other elements of federal regulations of railroads, would destroy the uniformity thought essential by Congress and would endanger the efficient operation of the interstate rail system.
>
> In addition, a state acquiring a railroad does so knowing that the railroad is subject to this long-standing and comprehensive scheme of federal regulation of its operations . . . "
>
> 455 U.S. at 689

THE *HANS* CASE – CONTINUED PRECEDENT?

THE *PARDEN* CASE – CONTINUED PRECEDENT?

Respondent devoted one sentence (Br. 20) in discussing the continued viability of *Hans v. Louisiana*, 134 U.S. 1 (1890). Our only additional comment on the matter of *stare decisis* is by reference to language of two opinions in *Payne v. Tennessee* (No. 90-5721, June 27, 1991; 1991 WL 111161 U.S.). The "unworkable standard" enunciated by Justice Souter (concurring) seems to fit *Hans* very well. As for *Parden*, in the *Payne* opinion, Chief Justice Rehnquist emphasized situations in Constitutional cases where "correction through legislative action is practically impossible." Here we deal with a situation, however, that could have easily undergone "correction through legislative

action" if Congress had *disagreed* with this Court's previous rulings concerning federal supremacy and applicability in rail legislation. The Chief Justice further noted that "reliance interests" need to be considered. Here, state legislatures, state workers compensation programs and the regulatory agencies, as well as the operators of state owned railroads, all have relied upon the definitive, pervasive and uniform patterns established under the decisions that Respondent would now overturn.

CONCLUSION

The decision of the Supreme Court of South Carolina should be reversed, and this matter remanded for trial in the state courts of South Carolina.

Respectfully submitted,*

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

KENNETH HILTON,
Petitioner,

v.

SOUTH CAROLINA PUBLIC RAILWAYS COMMISSION,
Respondent.

On Writ of Certiorari to the Supreme Court of South Carolina

BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-848

KENNETH HILTON,

Petitioner,

v.

SOUTH CAROLINA PUBLIC RAILWAYS COMMISSION,

Respondent.

On Writ of Certiorari to the Supreme Court of South Carolina

BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

This brief *amicus curiae* is filed with the consent of the parties, as provided for in the Rules of the Court.

INTEREST OF THE *AMICUS CURIAE*

The American Federation of Labor and Congress of Industrial Organizations ("AFL-CIO") is a federation of 90 national and international unions with a total membership of approximately 13,000,000 working men and women; many of these workers are employed in the transportation industries covered by the Federal Employers' Liability Act and are thus affected by this case.

SUMMARY OF ARGUMENT

This case does not present any issue of constitutional law but simply and only an issue of statutory interpretation: Did the Congress that enacted the Federal Employers' Liability Act, 45 U.S.C. § 51 *et seq.* ("FELA") intend the words "[e]very common carrier by railroad while engaging in commerce between any of the several States" to include a common carrier by railroad engaging in interstate commerce that is owned and operated by a State?

This precise question has already been answered in the affirmative by this Court. *Parden v. Terminal R. Co.*, 377 U.S. 184 (1964). This Court has reached the same conclusion in interpreting the virtually identical statutory language in other statutes regulating the interstate railroad system. *See infra* at 6. And this Court has consistently held that other federal regulatory statutes employing broad general terms of coverage—and not containing language providing in terms for coverage of state-owned enterprises—do cover state-owned enterprises that are within the general statutory coverage language. *See infra* at 6-7.

The South Carolina Supreme Court's conclusion that the FELA does not apply to state-owned railroads is based on a misreading of *Will v. Michigan Dep't of State Police*, 491 U.S. 1 (1980), a misreading that, if followed, would overrule or call into serious question a long line of this Court's statutory interpretation decisions. *See infra* 7-13.

The "unmistakably clear" rule of statutory interpretation stated in *Will* applies, by its terms, only when a proffered interpretation of a federal statute would alter the usual "balance between the States and the Federal Government" in a way that limits the "historic powers of the States. *See infra* at 7-9. As numerous decisions of this Court reflect, where Congress regulates a class of all entities engaged in a particular form of economic activity that is overwhelmingly but not entirely comprised

of privately-owned enterprises—and where the regulation is through rules that are intended to impose uniform obligations on the members of the class—the coverage of state-owned enterprises by the regulation is entirely consistent with the usual balance of our federal-state system. *See infra* at 10-13.

The FELA's application to state-owned railroads is the paradigm of the type of regulation of state-owned "business[es] of a private nature" (*Ohio v. Helvering*, 292 U.S. 360, 369 (1934)) that does not alter the usual "balance between the States and the Federal Government." That being so, the "unmistakable clear" rule of interpretation stated in *Will* does not govern this case.

In a series of decisions, this Court has developed and applied a consistent approach to determining whether a federal statute generally regulating industrial or commercial conduct is intended to apply to state-owned entities that engage in activities within the statute's zone of regulation. *See infra* at 14-17. In formulating this approach, the Court has expressly excluded any reliance on presumptions or presuppositions—including the rule of construction applied by the South Carolina Supreme Court—and has instead relied entirely on the language, purposes, and legislative history of the statute being interpreted. Application of that approach in this case leaves little doubt that the issue of the proper interpretation of the FELA, which the state defendant in this case wishes to revisit, was correctly decided in the first instance in *Parden*. *See infra* at 17-24.

Finally, even assuming *arguendo* that there were doubts about *Parden's* statutory holding—and that the FELA arguably contains an unwritten exception to "[e]very," the word that *is* written in the statutory language—there would still be no basis for a departure from *stare decisis* under the circumstances of this case. *See infra* at 24-26.

ARGUMENT

The Federal Employers' Liability Act (FELA) provides that "[e]very common carrier by railroad while engaging in commerce between any of the several States . . . shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce" as a result of the carrier's negligence. 45 U.S.C. § 51.

The question in this case is whether the statutory words "[e]very common carrier by railroad while engaging in commerce between any of the several States" cover all such common carriers—including those owned and operated by a State—or only common carriers owned and operated by private parties.

1. Stating the question presented suffices to show that this case arises in the sensitive area of federal-state relations. That being so, it facilitates analysis to begin by recalling the decisions of this Court that establish that this case does *not* present any issue of constitutional law but rather simply and only an issue of statutory interpretation.

Congress, in the first place, has the undoubted commerce clause power to regulate state-owned railroads that are a part of this country's interstate transportation system. *See Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 547-57 (1985); *see also National League of Cities v. Usery*, 426 U.S. 833, 854 n.18 (1976) (collecting earlier precedents and reaffirming their validity). It is perfectly well settled that the States have *no* constitutional immunity from such federal regulation.

It is equally plain that such federal commerce clause regulation may take the form of a federal cause of action that state courts of competent jurisdiction are by reason of the Supremacy Clause obliged to enforce. *See, e.g., FERC v. Mississippi*, 456 U.S. 742, 760-61 (1982); *Testa*

v. Katt, 330 U.S. 386, 389-94 (1947); *Second Employers' Liability Cases*, 223 U.S. 1, 56-59 (1911).

It is beyond doubt as well that the Eleventh Amendment has *no* application to a case brought, as here, in a *state* court rather than a federal court. *See Will v. Michigan Dep't of State Police*, 491 U.S. 58, 63-64 (1989); *Maine v. Thiboutot*, 448 U.S. 1, 9 n.7 (1980). To put this last point another way, this is *not* a case that turns in any way on the States' *constitutional* immunity from suit in the federal courts.[1]

2. All this being so, the inquiry in this case, as in any other statutory interpretation case, is one directed to determining congressional intent: Did the Congress that enacted the FELA intend the words "[e]very common carrier by railroad while engaging in commerce between any of the several States" to include a common carrier by railroad engaging in interstate commerce that is owned and operated by a State.

It is very much to the point—indeed we believe it is decisive—that this precise question has already been decided by this Court. In *Parden v. Terminal R. Co.*, 377 U.S. 184, 185 (1964), the Court stated that "Congress, in making the FELA applicable to 'every' common carrier by railroad in interstate commerce, meant what it said";

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[1] Where the scope of a federal statute turns on Congress' intent to abrogate the States' constitutional immunity to suit in the federal courts, this Court demands a clear and express statement in the statute that the States are subject to such suits. *See Dellmuth v. Muth*, 491 U.S. 223, 227-228 (1989); *Atascadero State Hospital v. Scanlon*, 473 U.S. 234 (1985).

This demanding rule of construction provides a prophylaxis against the unintended abrogation or forfeiture of the States' constitutional immunity. *See Atascadero*, 473 U.S. at 243; *see also Parden v. Terminal R. Co.*, 377 U.S. 184, 198-200 (1964) (White, J. dissenting). This approach is consistent with this Court's general approach to determining whether a constitutional right has been waived or forfeited. *See, e.g., Johnson v. Zerbst*, 304 U.S. 458, 464 (1938); *Colorado* v. *Spring*, 479 U.S. 564, 572-73 (1987).

viz., that the FELA applies to *every* railroad in interstate commerce, whether owned and operated by a State or by a private party.[2]

Parden, moreover, does not stand alone; this Court has reached the same conclusion in interpreting the virtually identical statutory language in other statutes regulating the interstate railroad system. *United States v. California*, 297 U.S. 175, 183-87 (1936) (Safety Applicance Act: "any common carrier engaged in interstate commerce by railroad"); *California v. Taylor*, 353 U.S. 553, 561-68 (1957) (Railway Labor Act: "any carrier by railroad, subject to the Interstate Commerce Act").[3]

The Court has also consistently held that other federal regulatory statutes employing broad general terms to define the statute's coverage—and not containing language providing in terms for coverage of state-owned enterprises—do cover state-owned enterprises that are within the general statutory definition. *See, e.g., Jefferson County Pharm. Assn. v. Abbott Labs.*, 460 U.S. 150, 154-62 (1983) (state-owned pharmacies covered by Robinson-Patman Act: "any person engaged in commerce"); *California v. United States*, 320 U.S. 577, 585-86 (1944) (state-owned terminal facility covered by Shipping Act of 1916: "any person not included in the term 'common carrier by water,' carrying on the business of forwarding or furnishing wharfage, dock, warehouse, or other terminal facilities in connection with a common carrier by water"); *Ohio v. Helvering*, 292 U.S. 360, 367, 370-71 (1934) (state-owned liquor store covered by Federal Liquor Tax: "[e]very person who sells or offers for sale foreign or domestic distilled spirits, wines or malt liquors . . ."). *Cf. Fry v. United States*, 421 U.S. 542 (1975) (States are covered by Economic Stabilization Act of 1970: "business and labor and other segments of the economy"); *Board of Trustees v. United States*, 289 U.S. 48 (1933) (federal import duties apply to purchases by state universities); *South Carolina v. United States*, 199 U.S. 437 (1905) (federal liquor tax applies to liquor stores operated by state contractors).

[2] In *Welch v. Texas Dep't of Highways and Public Transp.*, 483 U.S. 468, 476-78 (1987), this Court overruled *Parden* to the extent that *Parden* had held that damage suits against state-owned railroads could be asserted in *federal court*. The Court's decision in *Welch* delimited the federal courts' jurisdiction and was grounded squarely on the Eleventh Amendment.

The *Welch* Court expressly stated that it was not reconsidering the quite separate issue of statutory interpretation previously resolved in *Parden*; *viz.*, whether Congress intended the FELA to apply to state-owned railroads. *Welch*, 483 U.S. at 478 n.6. Of course, if Congress had such an intention, then FELA actions against state-owned railroads would be cognizable in the state courts, where the Eleventh Amendment imposes no jurisdictional bar to suit. *See supra* at 5; *see also* 45 U.S.C. 56 (making clear that FELA claims may be brought in state courts).

[3] The Interstate Commerce Act contains similar language, and the Interstate Commerce Commission had, even prior to this Court's decisions, read the Act as covering state-owned railroads. *See infra* at notes 10 & 11.

3. In the face of all this, the Supreme Court of South Carolina concluded that the FELA does not apply to state-owned railroads. The South Carolina Court predicated that conclusion on its reading of this Court's decision in *Will v. Michigan Dep't of State Police, supra*.[4]

If the South Carolina Court correctly understood *Will*, then *Will*, *sub silentio*, would have overruled—or called into serious question—each of this Court's statutory interpretation decisions cited above. The South Carolina Court, however, misread *Will*, as we now show.

(a) The question in *Will* was whether a State is a "person" within the meaning of 42 U.S.C. § 1983, which

[4] The South Carolina Supreme Court's reasoning is set out in an earlier decision not before the Court. *See Freeman v. South Carolina Public Railways Comm.*, 393 S.E.2d 383 (1990) (reprinted in Pet. App. at 9-14). The decision on review here simply dismissed petitioner's FELA action on the authority of this earlier decision. *See* Pet. App. at 7-8.

authorizes suits for damages, as well as injunctive relief, against "[e]very person who, under color of any [law], custom or usage, of any State or Territory . . . subjects, or causes to be subjected, any citizen . . . or other person . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws" of the United States.

If the answer to that question were in the affirmative, the entire panoply of state conduct would be subject to challenge in a suit for damages under § 1983. In that context, the Court in *Will* made the following statement relied upon by the South Carolina Court:

> The language of § 1983 also falls short of satisfying the ordinary rule of statutory construction that if Congress intends to alter the "usual constitutional balance between the States and the Federal Government," it must make its intention to do so "unmistakably clear in the language of the statute." *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 242 (1985); *see also Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89, 99 (1984). *Atascadero* was an Eleventh Amendment case, but a similar approach is applied in other contexts. Congress should make its intention "clear and manifest" if it intends to pre-empt the historic powers of the States, *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947), or if it intends to impose a condition on the grant of federal moneys, *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1, 16 (1981); *South Dakota v. Dole*, 483 U.S. 203, 207 (1987). "In traditionally sensitive areas, such as legislation affecting the federal balance, the requirement of clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision." *United States v. Bass*, 404 U.S. 336, 349 (1971). [*Will*, 491 U.S. at 65.]

As this passage makes clear, the predicate for the particular "ordinary rule of statutory construction" discussed

by the Court in *Will* is that a proffered interpretation of a federal statute would *"alter the 'usual constitutional balance between the States and the Federal Government' " in a way that limits the "historic powers of the States."* In that context, the argument for a rule of statutory interpretation that preserves the federal order as it has been shaped by time and usage against *unintended* statutory change is self-evident. And the Court's adoption of the "unmistakably clear" rule in this context is well suited to serving that protective purpose.[5]

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[5] We hasten to add that we believe the South Carolina Supreme Court to be incorrect in its apparent assumption that the "unmistakably clear" rule of *Will* requires that the language of the statute specifically and explicitly provide for the application of the statute to state entities—that is, that the States or state-owned entities be expressly referenced in the language of the statute.

Will did not purport to be adopting a new rule of statutory interpretation. Indeed, the *Will* Court said that it was applying the pertinent "ordinary rule" of interpretation. 491 U.S. at 65. Except in cases where the question raised is whether Congress intended to abrogate the Eleventh Amendment rights of the States—a question that raises peculiar constitutional concerns not present here, *see* n.1, *supra*—there is no ordinary rule of construction that requires a clear and express statement on the face of a statute of Congress' intent to regulate the States. While the *Will* Court did cite and quote from *Atascadero State Hospital v. Scanlon, supra*, the Court went on to state that, "*Atascadero* was an Eleventh Amendment case, but a similar approach is applied in other contexts." 491 U.S. at 65. None of the cases cited by *Will* as representative of these "other contexts" supports the South Carolina Supreme Court's reading of *Will* that the intention to regulate the States must be directly expressed in the statutory language.

Thus, the *Will* Court cited *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947), as standing for the proposition that "Congress should make its intention 'clear and manifest' if it intends to preempt the historic powers of the States . . . ." 491 U.S. at 65. But, at the page cited in *Will*, the *Rice* Court states that the "purpose" of Congress which is required to be "clear and manifest"

> may be evidenced in several ways. The scheme of federal regulation may be so pervasive as to make reasonable the inference that Congress left no room for the states to supplement it . . . . Or the Act of Congress may touch a field in which the federal

(b) By a parity of reasoning, where the large purposes spelled out in *Will* are not in point there is *no* basis for applying the rule of interpretation stated in *Will* to effectuate those purposes. That is the situation here. The salient point is that subjecting state-owned railroads to the

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> interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject . . . . Likewise, the object sought to be obtained by the federal law and the character of obligations imposed by it may reveal the same purpose . . . . Or the state policy may produce a result inconsistent with the objective of the federal statute . . . . It is often a perplexing question whether Congress has precluded state action or by the choice of selective regulatory measures has left the police power of the States undisturbed except as the state and federal regulations collide. [331 U.S. at 230-231 (citations omitted).]

Similarly, none of the remaining cases cited in *Will* contain a requirement that an intent to regulate the States be directly and explicitly stated in the statutory language. Indeed, in *United States v. Bass*, 404 U.S. 336, 349-350 (1971), the Court based its decision in significant part on the absence of sufficient evidence *in the legislative history* that Congress meant to "affect the federal-state balance in the way now claimed by the Government." *Id.* at 350. *Accord Pennhurst State School v. Halderman*, 451 U.S. 1, 18 (1981) (finding nothing in the statute "or its legislative history" to suggest that Congress intended to attach certain conditions on the disbursement of federal funds to the States); *South Dakota v. Dole*, 483 U.S. 203, 207 (1987) (citing *Pennhurst* as controlling authority in this context).

Of at least equal significance, *Will* itself did not rest its determination on the absence of an explicit statement in § 1983 of an intent to regulate the States. To the contrary, *Will* analyzed all available indicia of congressional intent. Thus, the Court found that the words used in § 1983 "would be a decidedly awkward way of expressing an intent to subject the States to liability." 491 U.S. at 64. The Court further found that interpreting "persons" to include States would make no sense in terms of the purposes of § 1983. *Id.* at 65-67. And, finally, the *Will* Court reviewed at length the legislative history of § 1983 and concluded that that history "does not suggest a different conclusion." *Id.* at 68. None of this analysis would have been necessary or even useful if the applicable rule of statutory interpretation required a direct and explicit statement of an intent to regulate the States in the language of the statute.

FELA does *not* alter the "usual constitutional balance between the States and the Federal Government" and does *not* constitute a federal limitation on the "historic powers of the States."

The established understanding is that where Congress regulates a class of all entities engaged in a particular form of economic activity that is overwhelmingly but not entirely comprised of privately-owned enterprises—and where the regulation is through rules that are intended to impose uniform obligations on the members of the class —the coverage of state-owned enterprises by the regulation is entirely consistent with the "usual" balance of our federal-state system.

In *Ohio v. Helvering*, 292 U.S. at 368, 369-370, an early leading case, the Court, in holding that a federal tax on liquor distributors applied to state-owned liquor distributors, stated:

> Whenever a state engages in a business of a private nature it exercises nongovernmental functions, and the business, though conducted by the state, is not immune from the exercise of the power of taxation which the Constitution vests in the Congress.
>
> * * * *
>
> If a state chooses to go into the business of buying and selling commodities, its right to do so may be conceded so far as the federal Constitution is concerned; but the exercise of the right is not the performance of a governmental function, and must find its support in some authority apart from the police power. When a state enters the marketplace seeking customers it divests itself of its *quasi* sovereignty *pro tanto* and takes on the character of a trader, so far, at least, as the taxing power of the federal government is concerned.

This recognition that federal regulation of state-owned "business[es] of a private nature" is *not* a departure

from the norm in our federal system has been uniformly followed. *See supra* at 5-7.

Not surprisingly then, the *Will* Court expressly recognized the distinction—for purposes of determining whether a federal statute alters the usual "balance between the States and the Federal Government"—between a federal statute that covers all state activities, as in *Will*, and a statute that covers only state activities that are within the zone of a general federal commercial regulation. *Will* did so by distinguishing *Jefferson County*, *supra*, in the following way:

> Moreover, the Court in *Jefferson County* was careful to limit its holding to "state purchases for the purpose of competing against private enterprise . . . in the retail market." 460 U.S. at 154. It assumed without deciding "that Congress did not intend the Act to apply to state purchases for consumption in traditional governmental functions," *ibid.*, which presents a more difficult question because it may well "affec[t] the federal balance." [491 U.S. at 64 n.5.] [6]

[6] *Will*'s citation of the quoted passage from *Jefferson County* presses into service the concept of "traditional governmental functions," a concept that had been adopted by this Court, and then later rejected. to define the limits of congressional power under the Tenth Amendment. *See Garcia*, *supra*, 469 U.S. at 537-47. It is therefore important to emphasize that there is a critical distinction between the "traditional governmental functions" notion as relevant evidence of congressional *intent* and the use of that notion as a basis for determining, under the Tenth Amendment, the extent of congressional *power* to regulate the States.

The question of the intent of Congress on the coverage of an unquestionably constitutional statute—which is the question presented here—is a question of historical fact: Did the Congress that enacted the FELA intend that statute to apply to state-owned railroads? In trying to resolve that issue of historical fact, it is relevant whether, at the time the statute was enacted, the operation of a railroad was understood to be one of the "historic powers" of

This Court's line of decisions from *United States v. California* through *Parden* makes it clear that inclusion of state-owned railroads that are part of the interstate railroad system within the coverage of a federal railroad statute of general application is the paradigm of the type of regulation of state-owned "business[es] of a private nature," *Ohio v. Helvering*, 282 U.S. at 369, that does *not* "alter the usual constitutional balance between the States and the Federal Government." That being so, the "unmistakably clear" rule articulated in *Will* does *not* govern this case. Without further ado, we therefore turn to our discussion of the "ordinary rule of statutory interpretation," *Will*, 491 U.S. at 65, that is pertinent here.

the States the regulation of which would "alter" the usual "balance between the States and the Federal Government."

In contrast, the question raised in the context of the Tenth Amendment—pre-*Garcia*—was not a question of fact but of theory: Are the States immune from a given federal regulation because the regulation would impinge on governmental functions that a court would *characterize* as "traditional," "integral," or "necessary" in nature? *See Garcia*, 469 U.S. at 546. As the Court found in *Garcia*, the defect in relying on such theoretical characterizations for determining the scope of the States' Tenth Amendment immunity is that

> [a]ny rule of state immunity that looks to the "traditional," "integral," or "necessary" nature of governmental functions inevitably invites an unelected federal judiciary to make decisions about which state policies it favors and which ones it dislikes. [469 U.S. at 546.]

This defect has no application in the present context. While the line between state-owned proprietary enterprises and traditional governmental functions will not always be so clear, in those cases where the activity to be regulated does fit clearly into one category or the other—as of the time Congress acts—it would make no sense to fail to take account of that relevant information as a useful guide to discerning the intent of Congress.

As *Will* recognized in its discussion of *Jefferson County*, there is no reason to assume that Congress intended an implied exception for the States when Congress' regulation does not touch upon what at the time of the enactment were considered traditional governmental functions. In these circumstances, application of a single rule of construction to all situations where a statute might apply to a state function would necessarily result in judicial distortions of the legislative will.

4. In a series of cases dating from at least 1934, this Court has developed and applied a consistent approach to determining whether a federal statute generally regulating industrial or commercial conduct is intended to apply to state-owned entities that engage in activities within the zone of regulation established by the statute. *See supra* at 5-7. As we now show, that approach is true to the basic principle that as long as Congress is acting within the constraints imposed in the Constitution, under Article I the

> Legislature has the power to decide what the policy of the law shall be, and if it has intimated its will, however indirectly, that will should be recognized and obeyed. . . . It is not an adequate discharge of duty for courts to say: We see what you are driving at, but you have not said it, and therefore we shall go on as before. [*Johnson v. United States*, 163 F. 30, 32 (1st Cir. 1908) (Justice Holmes, sitting as Circuit Justice).] [7]

The first of these decisions of which we are aware is *Ohio v. Helvering*, discussed *supra* at 7 & 11, where the question was whether States were "persons" or "corporations" within the meaning of a federal statute imposing a tax on liquor distributors. The statute made no specific mention of an intent to apply the tax to state-owned liquor stores, nor of an intent to exclude from the tax such liquor stores. The Court—after concluding that a State that engages in a business of a private nature is not immune from the federal taxing power in the conduct of that business—interpreted the statute straightforwardly, without the aid of presumptions or presuppositions. The Court stated that "[w]hether the word 'person' or 'corporation'

[7] For cases citing and following Justice Holmes' formulation in related contexts, *see, e.g., Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 585-86, 597-98 (1977) (legislation terminating an Indian reservation); *Keifer & Keifer v. Reconstruction Finance Corp.*, 306 U.S. 381, 387-92 & n.4 (1939) (legislation waiving the federal government's sovereign immunity).

includes a state . . . depends upon the connection in which the word is found." 292 U.S. at 370. The Court then construed those words in the light of the statutory purposes and held that "the state itself, when it became a dealer in intoxicating liquors, falls within the reach of the tax . . . ." *Id* at 371.[8]

The Court's decision in *Ohio v. Helvering* was adopted, and was expanded upon, in *United States v. California*, 297 U.S. at 185-86. The statutory interpretation issue in that case is indistinguishable from the statutory interpretation issue later presented in *California v. Taylor*, and again in *Parden*, and presented once more in the instant case, *viz.*, whether the statutory phrase "every" or "any" common carrier by railroad should be read to include state-owned railroads.

As here, the statute at issue in *United States v. California*—the Safety Appliance Act of 1893—did not expressly include or exclude state-owned railroads. And as here, the state defendant in *United States v. California*, urged the Court to apply a rule of construction that would make the statute inapplicable to state-owned railroads because the statute did not specifically name such entities as within its coverage. The Court unanimously rejected that argument in the following terms:

[8] In a previous decision, the Court had rejected with little discussion the suggestion that agents of the State who engaged in the sale of liquor were not covered by the federal liquor tax, since the broad, general statutory language allowed for "little doubt" on this score. *South Carolina v. United States*, 199 U.S. 437, 447 (1905). The Court then proceeded in the bulk of its opinion to address the State's contention that Congress was without the constitutional *power* to subject the States to such a tax. The Court rejected this contention as well. In so doing, the Court noted that "[t]here is a large and growing movement in the country in favor of the acquisition and management by the public of what are termed 'public utilities,' including not merely therein the supply of gas and water, *but also the entire railroad system*." *Id.* at 454 (emphasis added). In view of this movement, the Court found that the federal taxing power could easily be subverted were Congress denied the power to reach commercial activity conducted by the States. *Id.*

> Respondent invokes the canon of construction that a sovereign is presumptively not intended to be bound by its own statute unless named in it . . . . The presumption is an aid to consistent construction of statutes of the enacting sovereign when their purpose is in doubt, but it does not require that the aim of the statute fairly to be inferred be disregarded because not explicitly stated . . . . We can perceive no reason for extending it so as to exempt a business carried on by a state from the otherwise applicable provisions of an act of Congress, all-embracing in scope and national in its purpose, which is as capable of being obstructed by state as by individual action. Language and objectives so plain are not to be thwarted by resort to a rule of construction whose application in the circumstances would be highly artificial. [297 U.S. at 185-86 (citations omitted).] [9]

United States v. California was in turn expressly followed in each of the succeeding decisions of this Court addressing whether a regulatory statute applied to a state-owned entity that was indistinguishable for purposes of the regulation from a privately owned entity. *See California v. United States*, 320 U.S. at 585-586; *California v. Taylor*, 353 U.S. at 562; *Parden*, 377 U.S. at 187-90; and *Jefferson County*, 460 U.S. at 154-62 & n. 21.

Justice Frankfurter, writing for the Court in *California v. United States*, went to the heart of the matter:

> We need not waste time on useless generalities about statutory construction in order to conclude that

[9] The formulation of the canon of construction invoked by the respondent in *United States v. California* appears to have been a misstatement, because the enacting sovereign was the Federal Government, not the State that was seeking to avoid coverage by the statute. Nevertheless, the analysis stated in the remainder of the passage is applicable regardless of the precise terms of the canon sought to be applied. *See Jefferson County*, 460 U.S. at 161 n.21.

> entities other than technical corporations, partnerships and associations are "included" among the "persons" to whom the Shipping Act applies if its plain purposes preclude their exclusion. The critical question is whether the statute, read in the light of the circumstances that gave rise to its enactment and for which it was designed, applies also to public owners of wharves and piers. California and Oakland furnished precisely the facilities subject to regulation under the Act, and with so large a portion of the nation's dock facilities, as Congress knew (53 Cong. Rec. 8276), owned or controlled by public instrumentalities, it would have defeated the very purpose for which Congress framed the scheme for regulating waterfront terminals to exempt those operated by governmental agencies. [320 U.S. at 585-586.]

See also, e.g., Jefferson County, 460 U.S. at 157. (In finding that the States when engaged in the resale of pharmaceuticals in competition with private enterprises were "persons engaged in commerce" within the meaning of the Robinson-Patman Act, the Court stated that: "[t]he plain language of the Act is controlling unless a different legislative intent is apparent from the purpose and history of the Act.").

5. An examination of the language and purpose of the FELA, pursuant to the principles of statutory construction that we have just shown have been consistently followed by this Court, leaves little doubt that the issue the state defendant in this case wishes to revisit was correctly decided in the first instance by *Parden*.

The starting point is, as this Court has so often emphasized, the language of the statute itself. *See, e.g., United States v. Monsanto*, 491 U.S. 600, 606 (1989); *Dole v. United Steelworkers of America*, —— U.S. ——, 110 S.Ct. 929, 934 (1990). Here, the critical language of the statute is all-encompassing and admits of no exceptions: "*Every* common carrier by railroad while engag-

ing in commerce between any of the several States . . . shall be liable in damages to any person suffering injury" due to the negligence of the carrier. 45 U.S.C. § 51 (emphasis added).

As we have already discussed, virtually identical language has been used to define the scope of the series of federal statutes that together comprise the comprehensive scheme of federal regulation of the interstate railroad system. *See supra*, at 6 (discussing Safety Appliance Act and Railway Labor Act language and precedents).[10] *Parden*, and each of the other decisions of this Court construing this language, have correctly placed great weight on the scope of the words chosen by Congress, and have determined that Congress intended to adopt *uniform* federal regulation of the interstate railroad system, including regulation of any parts of that system operated by state-owned enterprises.

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[10] In addition to the FELA, the Safety Appliance Act, and the Railway Labor Act, the Interstate Commerce Act also extends, in similar broad general language, to the interstate rail system, covering all interstate transportation

> (1) by rail carrier, express carrier, sleeping car carrier, water common carrier, and pipeline carrier that is—
>
> (A) only by railroad;
>
> (B) by railroad and water, when the transportation is under common control, management, or arrangement for a continuous carriage or shipment; or
>
> (C) by pipeline or by pipeline and railroad or water when transporting a commodity other than water, gas, or oil. [49 U.S.C. § 10501.]

Other federal railroad regulation statutes with similarly broad and general coverage provisions include, *e.g.*, the Railroad Retirement Act of 1974, 45 U.S.C. 231 ("[t]he term 'employer' shall include," *inter alia*, "any express company, sleeping car company, and carrier by railroad" subject to the jurisdiction of the ICC); the Railroad Unemployment Insurance Act, 45 U.S.C. § 341 (same); the Federal Railroad Safety Act of 1970, 45 U.S.C. § 431 ("[t]he term 'railroad' as used in this subchapter means all forms of non-highway ground transportation that run on roads or electro-magnetic guideways . . ."); and the Hours of Service Act, 45 U.S.C. § 61 ("[t]he term 'railroad' shall have the same meaning as when used in the Federal Railroad Safety Act of 1970").

Thus, in *Parden*, the Court held that "in making the FELA applicable to 'every' common carrier by railroad in interstate commerce, [Congress] meant what it said." 377 U.S. at 187. Similarly, in *United States v. California*, the Court found the "all-embracing language" of the Safety Appliance Act—"*any* common carrier engaged in interstate commerce by railroad"—to be "so plain" as to remove any doubts concerning the applicability of the Act to state-owned railroads. 297 U.S. at 185-87. And in *California v. Taylor*, the Court held that "[t]he fact that Congress chose to phrase the coverage of the [Railway Labor] Act in all-embracing terms indicates that state railroads were included within it." 353 U.S. at 564. Indeed, in *California v. Taylor*, the Court specifically noted that

> the consistent congressional pattern in railway legislation which preceded the Railway Labor Act, [including the FELA], was to employ all-inclusive language of coverage with no suggestion that state-owned railroads were not included. [*Id.*] [11]

The deference these decisions paid to the use of the word "every" or "any" in the statutes' definitions of coverage is consistent with this Court's decisions finding other statutes with all-embracing definitions of coverage applicable to state-owned entities. *See supra* at 6-7 (collecting and quoting the statutory language from the applicable precedents).

As a more general matter too, this Court has understood the use by Congress of such all-embracing terms as "every," "any," or "all" to reflect a congressional in-

---

[11] Even before this Court's holdings in the cases cited in text, the Interstate Commerce Commission had held that the Interstate Commerce Act, *see* n.10, *supra*, governs state-owned railroads. *See California Canneries Co. v. Southern Pacific Co.*, 51 ICC Rep. 500, 502-03 (1917); *United States v. Belt Railroad*, 56 ICC Rep. 121, 121-22 (1919); *Texas State Railroad*, 34 ICC Val. R. 276, 276-77 (1930).

tent that there be no exclusions from the scope of the statute.[12]

The broad sweep of the coverage language of the railroad statutes is not a happenstance, but rather reflects Congress' overall objective in enacting these laws. Congress intended through this inter-related series of enactments to improve the safety and efficiency of the interstate railroad system by providing uniform and comprehensive regulation of the system as a whole and to foreclose any regulation by the States that might impinge upon this uniform regulatory scheme. *See, e.g., United Transportation Union v. Long Island Rail Road Co.*, 455 U.S. 678, 688 (1982) ("[T]he Federal Government has determined that a uniform regulatory scheme is necessary to the operation of the national rail system. . . . A disruption of service on any portion of the interstate railroad system can cause serious problems throughout the system.").

---

[12] For example, in *Baltimore National Bank v. State Tax Commission*, 297 U.S. 209 (1936), the question presented was the power of the States to tax bank shares owned by the Reconstruction Finance Corporation, an agency of the United States. The federal statute at issue provided that "all" shares of national banks operating within the jurisdiction of a State were subject to State taxation. The Court held that the "manifest intention" of Congress was—as the statute expressly provided—to subject "all" national bank shares to state taxation, without regard to whether the shares were owned by an instrumentality of the United States. 297 U.S. at 212-13. The Court found that "[i]n such a situation the burden is heavily on the suitor who would subject the word 'all' with its uncompromising generality to an unexpressed exception." *Id.* at 212. *See also id.* at 215 ("Across the petitioner's path there still lies the stumbling block of that uncompromising 'all' ").

United States v. Monsanto, 491 U.S. at 606-611, makes the same point; *viz.*, that in subjecting "any" and "all" property derived from a criminal offense to forfeiture, Congress intended "no exception . . . for the assets used to pay attorney's fees—or anything else, for that matter." *See also McLean v. United States*, 226 U.S. 376, 383 (1912) (" 'All' excludes the idea of limitation . . . .").

The history of the FELA itself manifests this congressional approach. Congress made clear that one of its purposes in passing the FELA—which established a negligence standard for common carriers and eliminated such traditional employer defenses as the "fellow servant rule" —was to induce carriers "to exercise the highest degree of care in selecting competent and careful persons and . . . to exercise over employees an authority and influence which will compel the highest degree of care on their part for the safety of each other in the performance of their duties." H.R. Rep. No. 1386, 60th Cong., 1st Sess. 2 (1980); *see also id.* at 3 (elimination of fellow servant rule "will be conducive to greater care in the operation of railroads"). And, Congress also declared that this purpose was to be served by establishing the FELA's standards as uniform throughout the interstate rail system. *See* H.R. Rep. No. 1386, *supra*, at 1 (the FELA is "intended in its scope to cover all commerce to which the regulatory power of Congress extends . . . [in order] to fix a uniform rule of liability throughout the Union with reference to the liability of common carriers to their employees").

In its first examination of the FELA, this Court recognized that the Act's protection of employee safety was part of an overall policy of promoting secure and efficient interstate commerce:

> If the agents or instruments are destroyed while they are doing the act, commerce is stopped; if the agents or instruments are interrupted, commerce is interrupted; if the agents or instruments are not of the right kind of quality, commerce in consequence becomes slow or costly or unsafe or otherwise inefficient; and if the conditions under which the agents or instruments do the work of commerce are wrong or disadvantageous, those bad conditions may and often will prevent or interrupt the act of commerce or make it less expeditious, less reliable, less

> economical, and less secure. [*Second Employers' Liability Cases*, 223 U.S. at 48; *see also United States v. Lowden*, 308 U.S. 225, 235-37 (1939); *Jamison v. Encarnacion*, 281 U.S. 635, 640 (1930); *Minneapolis, St. P. & S. Ste. M.R. Co. v. Rock*, 279 U.S. 410, 413-14 (1929).]

And, soon thereafter, the Court recognized that this policy was intended to be accomplished by giving the FELA uniform and exclusive effect throughout all of the interstate rail system:

> Whether and in what circumstances companies engaging in interstate commerce shall be required to compensate their employees in such commerce for injuries sustained therein are matters in which the nation as a whole is interested, and there are weighty considerations why the controlling law should be uniform and not change at every state line . . . . It was largely in recognition of this that the Employers' Liability Act was enacted by Congress. . . . [I]t was intended to be *very comprehensive*, to withdraw *all* injuries to railroad employees in interstate commerce from the operation of varying state laws, and to apply to them a national law having a uniform operation throughout all the states. [*New York Central R. Co. v. Winfield*, 244 U.S. 147, 149-50 (1916) (citations omitted; emphasis added).]

This Court has also recognized that in both of these regards the FELA is at one with the overall federal scheme for regulating the interstate railroad system.

Thus, this Court has recognized that the FELA is part of a regulatory scheme of numerous railroad employee safety and welfare statutes which seek to improve the efficiency of the interstate rail system by preventing employee-related interruptions of commerce. *See United States v. Lowden*, 308 U.S. at 237-38 (grouping the FELA, the Safety Appliance Act of 1893, the Hours of Service Act of 1907, and various other statutes together

as "designed mainly to insure the safety and welfare of railroad employees . . . [in order to] foster[] the commerce in which the employees were engaged").

And, this Court has recognized that virtually all federal railroad statutes—including, as already discussed, the FELA—were intended to establish uniform standards throughout the entirety of the interstate railroad system, and thus to pre-empt state regulation of that system. *See, e.g., Chicago & N.W. Tr. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 318 (1981) (Interstate Commerce Act); *Andrews v. Louisville & Nashville R. Co.*, 406 U.S. 320, 321-24 (1972) (Railway Labor Act); *Schwabacher v. United States*, 334 U.S. 182, 191-92 (1948) (Transportation Act); *Southern R. Co. v. Railroad Commission*, 236 U.S. 439, 446-48 (1915) (Safety Appliance Act); *Northern P.R. Co. v. Washington ex rel. Atkinson*, 222 U.S. 371, 376-77 (1912) (Hours of Service Act).

The railroad industry has been described by this Court as "'a state within a state.'" *California v. Taylor*, 353 U.S. at 565-66 (quoting Garrison, *The National Railroad Adjustment Board: A Unique Administrative Agency*, 46 Yale L.J. 567, 568-69 (1937)). And the FELA has been described as one piece of a "consistent congressional pattern" of legislation intended by Congress to govern this "state within a state" in a comprehensive and uniform manner. *California v. Taylor*, 353 U.S. at 562-67. In legislating so comprehensively in this field, Congress has sought to prevent *any* potential interference with interstate commerce by railroad. *Id.* at 566. *Accord, e.g., Second Employer's Liability Cases*, 223 U.S. at 48; *United States v. Lowden*, 308 U.S. at 234-40. This objective obviously would be undermined if state-owned railroads were permitted to operate portions of the interstate railroad system according to different rules and standards than those required by the federal enactments. As the Court has stated in the context of the Safety Appliance Act:

> The danger to be apprehended is as great and commerce may be equally impeded whether the defective appliance is used on a railroad which is state-owned or privately-owned. No convincing reason is advanced why interstate commerce and persons and property concerned in it should not receive the protection of the act whenever a state, as well as a privately-owned carrier, brings itself within the sweep of the statute, or why its all-embracing language should not be deemed to afford that protection. [*United States v. California*, 297 U.S. at 185.] [13]

6. We have shown to this point that *Parden* and the other railroad cases correctly concluded that state-owned railroads are subjected to the various statutes that comprise the federal scheme of regulation of the railroads.

But even assuming *arguendo* that there were doubts about *Parden*'s statutory holding—and that the FELA arguably contains an unwritten exception to "[e]very," the word that *is* written in the statutory language—there would still be no basis for a departure from *stare decisis* under the circumstances of this case. As the Court recently stated in *Patterson v. McLean Credit Union*, 491 U.S. 164, 172 (1989):

> [W]e have held that "any departure from the doctrine of *stare decisis* demands special justification." . . . We have said also that the burden borne by the party advocating the abandonment of an established precedent is greater where the Court is asked to overrule a point of statutory construction. Considerations of *stare decisis* have special force in the area of statutory interpretation, for here, unlike in

[13] *See also United Transportation Union v. Long Island Rail Road Co.*, 455 U.S. at 689 ("To allow individual states, by acquiring railroads, to circumvent the federal system of railroad bargaining, or any of the other elements of federal regulation of railroads, would destroy the uniformity thought essential by Congress and would endanger the efficient operation of the interstate rail system.").

> the context of constitutional interpretation, the legislative power is implicated, and Congress remains free to alter what we have done. [*Id.* at 172-173 (citation omitted).]

In *Patterson*, the Court identified three factors that might present "special justification" for overruling a prior statutory interpretation. Those factors are (1) "the intervening development of the law, through either the growth of judicial doctrine or further action taken by Congress," 491 U.S. at 173; (2) the precedent has become "a positive detriment to coherence and consistency in the law," *id.*; and (3) the precedent has been found "inconsistent with the sense of justice or with the social welfare," *id.* at 174. None of these factors support a departure from *stare decisis* here.

First, Congress has not acted to overturn *Parden* or any of those other precedents of this Court (or of the ICC) holding that state-owned railroads are within the scope of federal statutes applicable generally to railroad carriers. Indeed, in 1939—after the decisions in *United States v. California*, *supra*, and the ICC cases—Congress enacted a major revision of the FELA that left undisturbed the statutory phrase "[e]very common carrier by railroad." *See* 53 Stat. 1404.

Even if, contrary to what we have argued here, the Court would today apply a different and more stringent standard for ascertaining a congressional intent to apply federal enactments to the States, that possibility hardly presents an occasion for revisiting the question whether the 1908 Congress intended to cover state-owned railroads in enacting the FELA or whether the 1939 Congress so intended in revising the Act. Unless Congress was aware in 1908 or 1939 that the Court might likely apply an "unmistakably clear" rule or some variant thereof in cases of this sort, it makes little sense to judge congressional enactments in that time period under a set of newly an-

nounced rules of construction. *See Cannon v. University of Chicago*, 441 U.S. 677, 698-699 (1979) ("We, of course, adhere to the strict approach followed in our recent cases, but our evaluation of congressional action [taken prior to those cases] must take into account its contemporary legal context.").

Second, it can hardly be contended that adherence to *Parden* would be a "positive detriment to coherence and consistency in the law." As we have shown, this Court has, in a line of decisions spanning half a century, consistently upheld the application of general federal regulatory statutes to state-owned enterprises within the zone of the particular federal regulation. *See supra* at 5-7. Adherence to *Parden* would promote rather than frustrate coherence and consistency in the law—and in particular would promote coherence and consistency in the series of federal laws regulating the interstate railroad system.

Third, the decision in *Parden* is not "inconsistent with the sense of justice or with the social welfare." There has been no change in the collective values of our society that would render application of the FELA to state-owned railroads any less consistent with our collective sense of justice or social welfare than at any previous time. And, as far as we know, there has been no contention to the contrary.

CONCLUSION

For the foregoing reasons the decision of the South Carolina Supreme Court should be reversed.

Respectfully submitted

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Supreme Court of the United States

OCTOBER TERM, 1990

KENNETH HILTON,
Petitioner,

v.

SOUTH CAROLINA PUBLIC RAILWAYS COMMISSION,
Respondent.

On Writ of Certiorari to the Supreme Court of South Carolina

BRIEF OF THE NATIONAL GOVERNORS' ASSOCIATION, COUNCIL OF STATE GOVERNMENTS, NATIONAL ASSOCIATION OF COUNTIES, INTERNATIONAL CITY MANAGEMENT ASSOCIATION, NATIONAL LEAGUE OF CITIES, NATIONAL INSTITUTE OF MUNICIPAL LAW OFFICERS, U.S. CONFERENCE OF MAYORS, AND NATIONAL CONFERENCE OF STATE LEGISLATURES AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Whether the Federal Employers' Liability Act subjects the States to suits for damages.

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INTEREST OF THE *AMICI CURIAE*

Amici, organizations whose members include state, county, and municipal governments and officials throughout the United States, have a vital interest in all aspects of the law that affect state and local governments.

This case presents the question whether the general and indefinite jurisdictional statement of the Federal Em-

ployers' Liability Act (FELA) should be read to create a cause of action for damages against a State notwithstanding the well-established principle that is at the very core of the sovereign immunity doctrine—that the sovereign cannot be sued in its own courts without its consent.

The Supreme Court of South Carolina correctly concluded that the FELA does not subject the States to damages actions. Because of the importance of this issue to *amici* and their members, *amici* submit this brief to assist the Court in the resolution of this case.[1]

STATEMENT

Petitioner Kenneth Hilton filed an FELA action in federal district court alleging that he was injured while employed by respondent South Carolina Public Railways Commission. *See* Pet. 3. After this Court held in *Welch v. Texas Dep't of Highways*, 483 U.S. 468 (1987) that a legally equivalent action under the Jones Act, 46 U.S.C. App. § 688(a), could not be maintained against a State in federal court, Hilton dismissed his federal court action and refiled his FELA claim in state court. *See* Pet. 3. The trial court, finding that a State is not subject to the FELA, dismissed Hilton's claim. Pet. App. 19. The South Carolina Supreme Court affirmed for the reasons it had earlier articulated in *Freeman v. South Carolina Public Rys. Comm'n*, 393 S.E.2d 383 (1990). Pet. App. 7-8.

INTRODUCTION AND SUMMARY OF ARGUMENT

The question presented is whether, by the terms "every common carrier by rail", the FELA subjects the States to damages suits brought by individuals. We agree with petitioner's supporting *amicus* AFL-CIO that merely "[s]tating the question presented suffices to show that this case arises in the sensitive area of federal-state rela-

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[1] The parties' letters of consent have been filed with the clerk pursuant to Rule 37.3 of this Court.

tions." (Br. 4). Indeed, it is precisely because this case directly affects the constitutional balance between the States and the federal government that the Court should apply the "ordinary rule of statutory construction" that requires a federal statute to contain unmistakably clear statutory language before a court may conclude that Congress has created an action for damages against the States. *See Will v. Michigan Dep't of State Police*, 491 U.S. 58, 65 (1989).

Both petitioner and his supporting *amicus* err in contending that this case should be resolved without reference to the clear statement rule. Our federal scheme requires clear evidence of congressional intent to limit the sovereign authority of the States before the States can be subjected to a damages suit brought by an individual. Because the FELA does not clearly manifest Congress's intent to include the States within the class of entities that may be sued, an FELA damages claim may not be asserted against the States. Moreover, the fact that Congress did not abrogate the States' Eleventh Amendment federal court immunity when it enacted the FELA, *see Welch v. Texas Dep't of Highways*, 483 U.S. 468 (1987), strongly supports the conclusion that Congress did not intend to subject the States to state court suits under the statute. As far as *amici* are aware, there is no precedent for Congress having created a federal cause of action against the States for damages that can be brought in state court, but not in federal court. Nor would Congress have created such an unusual regime absent a clear expression of its intention to do so.

The FELA must also be construed consistent with legislative understanding contemporaneous with its passage. When the FELA was passed in 1908, the sovereign's immunity from suits for damages was unquestioned. While the FELA explicitly did away with a number of tradi-

tional common-law defenses, it did not change this core premise of the law.

ARGUMENT

CONGRESS DID NOT SUBJECT THE STATES TO SUITS FOR DAMAGES UNDER THE FELA

I. The States Are Not Subject to Damages Actions Under Federal Legislation Absent a Clear Expression of Congressional Intent

1. The basic principles controlling this case are settled. A proper respect for the States' position in the constitutional scheme requires that courts take special care in determining whether the federal government has decided in any given instance to exercise power in a manner directly affecting state sovereignty. "Congress may abrogate the States' constitutionally secured immunity from suit in federal court only by making its intention [to do so] unmistakably clear in the language of the statute." *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 242 (1985); *see also Welch* at 476-77 (plurality opinion); *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 99 (1984) (*Pennhurst II*). Congress must likewise clearly express its intent to subject the States to damages suits by individuals. *Will*, 491 U.S. at 65.

The clear statement rule is an indispensable means of safeguarding the States' sovereignty and thereby preserving the constitutional balance of authority between the federal government and the States. *See Will*, 491 U.S. at 65; *Atascadero State Hospital*, 473 U.S. at 242. On numerous occasions, this Court has emphasized the importance of this rule. For instance, Congress's power to abrogate the States' Eleventh Amendment immunity "means that in certain circumstances the usual constitutional balance between the States and the Federal Government does not obtain"; accordingly, a court must be certain that Congress intended to exercise that

power before concluding that the States are subject to the jurisdiction of the federal courts. *Id.* Similarly, because legislation grounded in Congress's power under the Fourteenth Amendment "imposes congressional policy on a State involuntarily, and because it often intrudes on traditional state authority," there is a compelling need to ensure that Congress in fact intended that result. *Pennhurst State School & Hospital v. Halderman*, 451 U.S. 1, 16 (1981) (*Pennhurst I*). Requiring a clear statement "provides assurance that 'the federal-state balance' * * * will not be disturbed unintentionally by Congress or unnecessarily by the courts". *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977) (citations omitted). " 'In traditionally sensitive areas, such as legislation affecting the federal balance, the requirement of a clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision.' " *Will*, 491 U.S. at 65, quoting *United States v. Bass*, 404 U.S. 336, 349 (1971). *See also Welch*, 483 U.S. at 477; *Parden v. Terminal Ry.*, 377 U.S. 184, 199 (1964) (White, J., dissenting).

The necessity of a clear statement is integral to Eleventh Amendment jurisprudence. *Will* establishes that the requirement is equally necessary here. *See* 491 U.S. at 65. Ambiguity surrounding Congress's intent is particularly troublesome in the area of sovereign immunity, when (as in this case) a federal statute is asserted to require a State's courts to entertain damages claims against the State in clear contravention of that doctrine. Sovereign immunity ensures that "[w]ithout [a State's] consent it cannot be sued *in any court, by any person, for any cause of action whatever.*" *Hopkins v. Clemson Agricultural College*, 221 U.S. 636, 642 (1911) (emphasis added). Congressional action that nevertheless subjects the States to individuals' damages suits substantially intrudes upon state sovereignty: "Mr. Chief Justice Jay described sovereignty as 'the right to govern'; that kind

of right would necessarily encompass the right to determine what suits may be brought in the sovereign's own courts." *Nevada v. Hall*, 440 U.S. 410, 415 (1979) (quoting *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 472 (1793)).

It is not even clear that Congress has the authority to require unwilling state courts to hear suits against the States. *Amici* are not aware of a single case in which state courts have been required to entertain federal law damages actions that federal courts cannot entertain. *Cf. Employees v. Missouri Public Health Dep't*, 411 U.S. 279, 287 (1973) (declining to reach question whether state court required to hear action federal court barred from hearing). Nor are we aware of any case in which the Court has addressed the scope of Congress's authority to require state courts to hear such cases—apparently because the federal government has never attempted to confer such jurisdiction on unwilling state courts. *Cf. FERC v. Mississippi*, 456 U.S. 742, 759, 764-765 (1982) (addressing scope of congressional authority to use state regulatory machinery to advance federal goals). It is clear, however, that from the time of the ratification of the Constitution it has been "an 'established principle of jurisprudence' that the sovereign cannot be sued in its own court without consent." *Will*, 491 U.S. at 67 (quoting *Beers v. Arkansas*, 61 U.S. (20 How.) 527, 529 (1858)); *see Nevada v. Hall*, 440 U.S. at 420; *id.* at 431 (Blackmun, J., dissenting). In the infrequent instances in which the issue has been litigated, the Court accordingly has indicated that States may assert sovereign immunity to preclude even federal constitutional claims in state court. *See Ohio Oil Co. v. Conway*, 279 U.S. 813, 814 (1929); *Palmer v. Ohio*, 248 U.S. 32, 34 (1918); *Hopkins*, 221 U.S. at 642.

As the plurality indicated in *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 22 (1989), where Congress has included in the legislation an unmistakably clear statement, the States may be deemed to have consented to the assertion against them in federal court of suits "based on congressionally created causes of action." *See also Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976). But the States' authorization of the creation by Congress of federal court remedies does not mean that, in ratifying the Constitution, the States took the far more radical step of waiving the protection of sovereign immunity in their own courts. Indeed, while the amenability of States to suit in federal court under Article III was debated extensively at the time of the Constitution's ratification, *see Welch*, 483 U.S. at 480-484 (plurality opinion); *id.* at 504-507, 511-513 (Brennan, J., dissenting); *Atascadero State Hospital*, 473 U.S. at 263-280 (Brennan, J., dissenting), *amici* are aware of no suggestion during these debates that *state courts* might be obligated to entertain claims against States. That is hardly surprising: it was and remains a fundamental tenet of sovereign immunity that, wherever else it may be hauled into court, "no sovereign may be sued in its own courts without its consent." *Nevada v. Hall*, 440 U.S. at 416.

It is clear to us that the Court should not attempt to resolve difficult questions about the scope of federal authority to require state courts to hear actions against the States, absent a crystal clear statement of Congress' intent to require the exercise of state court jurisdiction.[2]

[2] It is doubtful that Congress even has the constitutional authority to expand the jurisdiction of unwilling state courts in this manner. *See Brown v. Gerdes*, 321 U.S. 178, 188 (1944) (Frankfurter, J., concurring) ("Neither Congress nor the British Parliament nor the Vermont Legislature has power to confer jurisdiction upon the New York courts"); *Claflin v. Houseman*, 93 U.S. 130, 141 (1876) ("Not that Congress could confer jurisdiction upon the State courts"). Nor is the existence of such congressional authority necessary to safeguard federal interests. "Since the rights involved are based upon Acts of Congress, there is no reason to fear that Congress would fail to give adequate protection to these rights" by making an action available in the federal courts. T. Sandalow, *Henry v. Mississippi and the Adequate State Ground: Proposals for a Revised Doctrine*, 1965 Sup. Ct. Rev. 187, 207 n.85 [hereinafter Sandalow].

Where the question is one of constitutional dimension—whether a federal statute *requires* the States to be subjected to federally created damages claims in their own courts—the answer may be arrived at only through a strict application of the clear statement rule. "In the absence of a declaration by Congress that state courts must enforce rights that Congress has created, there appears to be no reason why the Supreme Court should impose such an obligation." Sandalow, *supra*, at 207.

2. Petitioner (Br. 4-5) and his supporting *amicus* (Br. 4-5) argue that this Court's decisions under the Eleventh Amendment are not relevant to this case. *Amici* recognize that the Eleventh Amendment does not apply in state courts, *see Will*, 491 U.S. at 63-64, and that the resolution of the question whether a statute abrogates the States' Eleventh Amendment immunity is not in itself dispositive of the question whether the statute creates a cause of action against the States. *See Welch*, 483 U.S. at 476 n.6.[3]

Will nevertheless establishes that Congress will not be deemed to have subjected the States to individual damages actions, either in state or federal court, unless Congress makes "its intention to do so 'unmistakably clear in the language of the statute.'" *Will*, 491 U.S. at 65, quoting *Atascadero State Hospital*, 473 U.S. at 242. The Court looks to the Eleventh Amendment as a guide in determining whether Congress intended that a federal cause of action apply to the States. "[I]n deciphering congressional intent as to the scope of a statute, "the scope of the Eleventh Amendment is a consideration."

[3] Presumably Congress could, for example, do something that it clearly has not done here—enact a statute that expressly preserves the States' Eleventh Amendment immunity but at the same time expressly includes the States within the class subject to liability on the federal claim.

Will, 491 U.S. at 66-67. This Court has declined to construe a statute in disregard of the Amendment. *See id.*[4]

The Court's Eleventh Amendment jurisprudence is relevant to this case because of the close relationship between the pivotal issue of statutory construction under the Eleventh Amendment—whether Congress intended to subject the States to suit in federal court—and the question here: whether Congress intended to subject the States to individual damages actions. Given the close similarity of the inquiries, Congress would expect them to be answered in the same way, pursuant to the same canon of statutory construction, in order to avoid inconsistent interpretations of the same statute.

Moreover, applying different statutory interpretation standards to the liability and Eleventh Amendment issues increases the chances that the courts will create a class of federal law actions against the States that may be brought only in state court—a peculiar result that is most unlikely to reflect what Congress meant to accomplish. Congress would not make "[s]uch a major change in the existing rules * * * without specific provision in the text of the statute." *United Savings Ass'n v. Timbers of Inwood Forest*, 484 U.S. 365, 380 (1988) (citation omitted).

3. There is no basis for declining to apply *Will's* clear statement rule in this case. The AFL-CIO argues that the rule of *Will* applies only in suits directed against

[4] As *Will* establishes, requiring a clear statement of congressional intent before allowing an individual to bring a federal action for damages against a State is consistent with similar requirements not only in the Eleventh Amendment context but in other areas of the law. Thus *Will* noted that the Court applies clear statement requirements in determining, for example, whether Congress intended "to pre-empt the historic powers of the States," 491 U.S. at 65 (citing *Rice v. Santa Fe Elevator Corp.*, 331 U.S. at 230) or "to impose a condition on the grant of federal moneys." 491 U.S. at 65 (citing *Pennhurst I*, 451 U.S. at 16; *South Dakota v. Dole*, 483 U.S. 203, 207 (1987)).

"historic powers" of the States. (Br. 2-3, 7-9.) Under this view, a court need only apply the unmistakably clear statement rule in determining whether Congress has created a damages action directed against "governmental" functions of a State; a court need not apply the rule to determine whether Congress has created a damages action against a state-operated enterprise.

This argument is based on a misreading of *Will*. While the clear statement doctrine that was applied to *Will*'s state court action had its origins in Eleventh Amendment jurisprudence, *see Will*, 491 U.S. at 65, citing *Atascadero State Hospital*, 473 U.S. at 242, the *Will* Court made it clear that "a similar approach" of requiring a clear congressional statement "is applied in other contexts." 491 U.S. at 65. The "historic powers" language that the AFL quotes is not a limitation on *Will*'s holding, but is instead lifted from one of the examples that *Will* gave of other areas in which a clear statement is required: the requirement of a clear congressional statement to pre-empt the historic regulatory powers of the States. *See Will*, 491 U.S. at 65 (citing *Rice v. Santa Fe Elevator Corp.*, 331 U.S. at 230); *see also* note 4, *supra*. In arguing that an unmistakably clear statement of congressional intent is necessary only when determining whether Congress has created a damages action directed against the States' "historic powers", the AFL has incorrectly sought to narrow the clear statement rule in a manner contrary to its formulation in *Will*. The necessity of a clear statement is not dependent upon the state function against which the federal action is directed. It is necessary because, as we have demonstrated above (*see* pp. 5-7, *supra*), forcing a State's own courts to hear damages actions against the State is a fundamental interference with the sovereign power of the States to determine whether they may be sued in their courts.[5]

[5] In an effort to establish that *Will* itself is based upon an implicit distinction between "historic" governmental powers and state-operated enterprises, the AFL also (Br. 12) relies upon *Will*'s discussion of *Jefferson County Pharmaceutical Ass'n v. Abbott Labs*, 460 U.S. 150 (1983). *See Will*, 491 U.S. at 64-65 n.5. According to the AFL, the governmental/proprietary distinction is at the basis of *Will* because *Will* noted that the decision in *Jefferson County* (which allowed an injunctive action against a state-operated enterprise) was limited to state purchases for the purpose of competing against private enterprise. Seizing upon *Will*'s statement that an action against state purchases for traditional governmental functions would present a more difficult question because it might well "affect the federal balance", *id.* (citation omitted), the AFL argues that *no* action affects the federal balance when it is directed against a State's providing services which are also provided by private enterprise.

In so arguing, the AFL seeks to transform equivocal dicta into a clear statement of law. The AFL ignores the primary basis upon which *Will* distinguished *Jefferson County*: *Will*, like the instant case, was an action for damages; *Jefferson County* was an injunctive action in which the damages claim had already been dismissed as barred under the Eleventh Amendment. *See* 491 U.S. at 64-65 n.5 (citing *Jefferson County*, 460 U.S. at 153 n.5). This distinction between damages and injunctive relief is "commonplace in sovereign immunity doctrine." *Will* 491 U.S. at 71 n.10 (quotation omitted).

The distinction the AFL seeks to create also leads this Court back to the governmental/proprietary functions analysis rejected in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985). While *amici* have grave reservations about whether the *Garcia* Court gave proper weight to the constitutional role of states in reaching its result, for purposes of this case this much is certain: *Garcia* abolished the governmental/proprietary distinction upon which the AFL relies. And as this Court noted in *Welch* (when construing the applicability of the Jones Act to a state function that the AFL would no doubt describe as proprietary), "the constitutional role of the States sets them apart from other employers and defendants." *Welch*, 483 U.S. at 477; *see also Atascadero State Hospital*, 473 U.S. at 246; *Pennhurst II*, 465 U.S. at 99; *Edelman v. Jordan*, 415 U.S. 651, 673 (1974); *Quern v. Jordan*, 440 U.S. 332, 342-343 (1979).

The central role that the governmental/proprietary distinction plays in the AFL's argument is evident from the weight given to *Ohio v. Helvering*, 292 U.S. 360 (1934) and its progeny. *See* Br. 3, 11-17. The AFL cites *Helvering* for the twin propositions that (1) applying the FELA to the States is merely regulation of a state-owned "business * * * of a private nature," 292 U.S. at 369, and (2) such "regulation" does not alter the usual balance between the States and the federal government. But neither *Helvering* nor its progeny establish that in operating business enterprises States lose all the protections flowing from their special position in the constitutional system. In language quoted by the AFL, the *Helvering* Court clearly limited its holding to the conclusion that a State operating an enterprise "divests itself of its *quasi* sovereignty *pro tanto* and takes on the character of a trader, so far, at least, as *the taxing power of the federal government is concerned.*" 292 U.S. at 369 (emphasis added). *Helvering* says nothing about a State's immunity from suit and sheds no light upon what rule a court should apply when Congress, having gone beyond the mere regulation of a state-operated enterprise, is asserted to have created a cause of action for citizens to sue the State for damages.

The AFL makes the same mistake in relying upon other cases in which the Court concluded that the States were subject to *regulation* (rather than to damages suits) under a federal statute. (Br. at 15, 19) (citing *California v. Taylor*, 353 U.S. 553, 562-564 (1957); *United States v. California*, 297 U.S. 175, 185-186 (1936)). As *Welch* and the dissent in *Parden* noted, the *Parden* majority mistakenly relied upon these very cases. *Welch*, 483 U.S. 476-477 & n.7 (citing *Parden*, 377 U.S. at 200, n.2 (White, J., dissenting)). *California v. Taylor* was a suit against the National Railroad Adjustment Board in which sovereign immunity was not an issue. *See* 353 U.S. at 568, n.16. *United States v. California* was a suit

brought by the United States, against which state sovereign immunity is not operative. *See Welch*, 483 U.S. 476-477 & n.7. The two decisions simply are not relevant here because the issue is not whether the States are to be subject to the same regulations as private industry; the issue is the delineation of the class of actors that Congress, in enacting the FELA, intended to subject to individuals' actions for damages.

The core premise that underlies the AFL's reliance upon *Helvering* and its progeny, that a State divests itself of sovereignty when it enters the marketplace,

> sound[s] more of *ipse dixit* than reasoned explanation. This inability to give principled content to the distinction between "governmental" and "proprietary," no less significantly than its unworkability, led the Court to abandon the distinction [in the field of tax immunity] in *New York v. United States*[, 326 U.S. 572 (1946)].

Garcia, 469 U.S. at 543. Under *Garcia*, the governmental/proprietary distinction does not exist as a criterion for determining whether States are subject to regulation; there is no basis for concluding that it nonetheless exists as a criterion for determining whether a State is subject to an individual's damages action.[6]

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[6] The AFL seeks to resurrect the governmental/proprietary distinction by arguing that there is a critical difference between using the distinction as a basis for determining the "historical fact" of congressional intent, as in this case, and as a basis for determining congressional power, as in *Garcia*. (Br. at 12-13 n.6.) But if, as the AFL states, the essence of its contention is that the statute should be construed in keeping with the "historical fact" of whether the Congress that enacted the FELA intended the statute to apply to the States, the only conclusion possible is that Congress did not so intend. As we demonstrate below (*see* pp. 16-17, *infra*), the Congress that enacted the FELA did so on the assumption that States were immune from damages suits by individuals. *See Welch*, 483 U.S. at 496 (Scalia, J., concurring in part and concurring in the judgment).

This Court should accordingly reject the invitation to treat the States as just another employer for the purpose of determining whether Congress has created an action in which individuals may sue a State for damages. Where the issue is not whether Congress intended to regulate state-operated enterprises, but whether it intended to create an action for individuals to sue a State for damages, the Court should apply the clear statement rule of *Will*.

II. Congress Has Not Clearly Indicated An Intent to Apply the FELA to the States

Given the applicability of the clear statement rule, there is no basis for determining that the FELA applies to the States. This conclusion is mandated by two reasons. First, nothing in the language of the FELA indicates that the States may be sued under the statute. Second, viewed in the contemporary legal context of its enactment, the FELA's purpose and legislative history contain no evidence that Congress intended or even anticipated that result.

A. The Statutory Language Does Not Clearly and Unequivocally Express Congressional Intent to Apply the FELA to the States

The holding in *Welch* virtually compels the conclusion that the FELA does not contain a clear and unmistakable statement of congressional intent to apply the statute to the States. Although the holding in *Welch* was predicated upon the absence of a clear statement of congressional intent to abrogate the States' Eleventh Amendment immunity, that holding rested on the determination that "Congress ha[d] not expressed *in unmistakable statutory language* its intention to allow States to be sued in federal court * * *." 483 U.S. at 475 (emphasis added). Even though the Jones Act extended to "any seaman" who suffered personal injury in the course of his employment, the Court held that "[b]ecause of the role of the States in our federal system, '[a] general authorization

for suit in federal court is not the kind of *unequivocal statutory language* sufficient to abrogate the Eleventh Amendment.'" *Id.* at 476, quoting *Atascadero State Hospital*, 473 U.S. at 246 (emphasis added). That analysis is dispositive in the present case: because Congress did not set forth with clarity its intent to override the States' sovereign immunity and subject them to damages liability, the FELA cannot be construed to impose such liability upon the States. If Congress had intended to create a cause of action directly against the States, it would have either ensured that such actions could be brought in federal court, or indicated that it was taking the unusual step of creating a class of federal actions that could only be brought in state court. It did neither.

As with any question of statutory interpretation, analysis of the scope of the FELA must begin with the relevant statutory language—here, the phrase "every common carrier by rail." 45 U.S.C. 51. The argument that every carrier must mean *every* carrier, including those owned by States, has surface appeal. As the AFL-CIO puts it, "'[I]n making the FELA applicable to "every" common carrier by railroad in interstate commerce, [Congress] meant what it said.'" Br. at 19 (quoting *Parden*, 377 U.S. at 187). This assertion does not withstand scrutiny, however.

The general jurisdictional language of 45 U.S.C. 51 is not a clear expression of Congress's intent to apply the FELA to the States. *Cf. United States v. United Mine Workers*, 330 U.S. 258, 271-273 (1947) ("statutes which in general terms divest pre-existing rights or privileges will not be applied to the sovereign without express words to that effect"). Given the fixity of the sovereign immunity doctrine, general statutory language neither gives the sovereign States adequate notice of the possibility that they may be held accountable in damages, nor demonstrates that Congress specifically contemplated

that possibility. *See id.; see also Welch*, 483 U.S. at 477 (citing *Parden*, 377 U.S. at 198-199 (White, J., dissenting)). In the Eleventh Amendment context this Court has repeatedly stated that a formal indication of Congress' intent to abrogate the States' immunity ensures that Congress does not impose fiscal burdens on the States inadvertently. *See Quern*, 440 U.S. at 344 n.16; *Hutto v. Finney*, 437 U.S. 678, 697 n.27 (1978); *Employees v. Missouri Public Health Dep't*, 411 U.S. at 279, 284-285. The constitutional safeguard of deliberateness is lost if the right of individuals to bring damages actions against States can be inferred from general language in federal legislation without *any* indication (much less a clear one) that Congress intended that result.

B. The Contemporary Legal Context of the FELA Shows That Congress Did Not Intend to Impose Liability on the States

1. The "contemporary legal context" of legislation must be taken into account in determining Congress' intent. *Cannon v. University of Chicago*, 441 U.S. 677, 699 (1979). As Justice Scalia noted in his concurrence in *Welch*, Congress enacted the FELA

> on the assumption that States were immune from suits by individuals. Even if we were now to find that assumption to have been wrong, we could not, in reason, interpret the statutes as though the assumption never existed. Thus, although the terms of the Jones Act (through its incorporation of the FELA) apply to all common carriers by water, I do not read them to apply to States. For the same reason, I do not read the FELA to apply to States, and therefore agree with the Court that *Parden* * * * should be overruled.

Welch, 483 U.S. at 496 (Scalia, J., concurring in part and concurring in the judgment).

Justice Scalia's formulation accurately reflects the understanding of the legislators who enacted the FELA.

For decades before the Act was passed in 1908, the rule that "the sovereign cannot be sued *in his own courts* without his consent" was "a familiar doctrine of the common law". *The Siren*, 74 U.S. (7 Wall.) 152, 153-54 (1869) (emphasis added). "It is obvious that the public service would be hindered, and the public safety endangered, if the supreme authority could be subjected to suit at the instance of every citizen, and consequently controlled in the use and disposition of the means required for the proper administration of the government." *Id.* at 154; *see also Railroad Co. v. Tennessee*, 101 U.S. (11 Otto) 337, 339 (1880) ("The principle is elementary that a State cannot be sued *in its own courts* without its consent.") (emphasis added); *Nichols v. United States*, 74 U.S. (7 Wall.) 122, 126 (1869); *Beers v. Arkansas*, 61 U.S. (20 How.) at 529; J. Dillon, *Treatise on the Law of Municipal Corporations* § 14 (1872). State sovereign immunity has common law roots reaching well back into English history. *See generally* 5 F. Harper, F. James & O. Gray, *The Law of Torts*, §§ 29.1-29.4, at 596-618 (2d ed. 1986).

The legislative history of the FELA also supports the conclusion that it was not meant to apply to the States. The Act revolutionized the tort system by sweeping away a large number of traditional common law defenses. *See Rogers v. Missouri Pac R.R. Co.*, 352 U.S. 500, 507-508 (1957); *Second Employers' Liability Act Cases*, 223 U.S. 1, 49-50 (1912). The legislative history plainly sets out the ways in which the Act affected preexisting common-law rules:

> The purpose of this bill is to change the common-law liability of employers of labor in this line of commerce, for personal injuries received by employees in the service. It abolishes the strict common-law rule of liability which bars a recovery for the personal injury or death of an employee, occasioned by the negligence of a fellow-servant. It also relaxes

> the common-law rule which makes contributory negligence a defense to claims for such injuries.

H.R. Rep. No. 1386, 60th Cong., 1st Sess. 1 (1908); *see* S. Rep. No. 460, 60th Cong., 1st Sess. 1 (1908).

The FELA addressed and explicitly changed four specific aspects of the common law: it abolished the fellow servant rule, assumption of risk, contributory negligence, and waiver of the right to sue. Sovereign immunity was left untouched. *See* 42 Cong. Rec. 4527 (1908) (statement of Sen. Dolliver) ("These are the four propositions contained in the bill."); *id.* at 4427 (statement of Rep. Henry) (bill changes four rules of the common law). It can only be concluded that Congress intended to incorporate the common law doctrine of sovereign immunity to limit the scope of liability under the FELA. *Cf. Will*, 491 U.S. at 67-68 (absent clear statement, Court would not conclude that statute was intended to disregard sovereign immunity).

2. In an effort to establish that the FELA applies to the States, Hilton (Br. 11) relies upon *Petty v. Tennessee-Missouri Bridge Comm'n*, 359 U.S. 275 (1959); both Hilton (Br. 11) and the AFL (Br. 5-6, 19) rely upon *Parden*. This reliance is misplaced.

The defendant in *Petty* was not a State, but a bi-State entity created with the consent of Congress, as required by the Compact Clause. *See Petty*, 359 U.S. at 277 (citing U.S. Const. art. I, § 10, cl. 3). For the purpose of its Eleventh Amendment waiver analysis, the Court "assume[d] *arguendo*" that the suit had to be "considered as one against the States". *Id.* at 279. Any suggestion in *Petty* that the FELA applies to States is dicta. Since a bi-State agency is at least as much a creature of Congress as of the States, the considerations underlying the clear statement rule for questions of statutory construction do not necessarily apply. And even if *Petty* did assume that the FELA applied to the States, *sub silentio* holdings do not bind this Court in a subsequent case that brings an issue squarely before it. *See Will*, 491 U.S. at 63 n.4 (citing *Hagans v. Lavine*, 415 U.S. 528, 535 n.5 (1974)).

Like *Petty*, *Parden* turned on the waiver of Eleventh Amendment immunity. *See* 377 U.S. at 186. *Welch* overruled *Parden* to the extent that *Parden* held that general statutory language—in that case the same reference to "every common carrier by railroad," *see id.* at 185, at issue here—could nullify such immunity. *See Welch*, 483 U.S. at 476-478. We submit that *Parden*'s analysis of the applicability of the statute to the States is undermined by the same misreading of this general language. *See also Welch*, 483 U.S. at 496 (Scalia, J., concurring in part and concurring in the judgment) (*Parden* should be overruled to extent that it holds that FELA applies to the States). While the AFL argues (Br. 24-26) that *Parden*'s statutory holding should be retained at least as a matter of *stare decisis*, we note that "the same respect for the rule of law that requires [this Court] to seek consistency over time also requires [it] * * * to seek consistency in the interpretation of an area of law at any given time." *Arkansas Electric Co-op v. Arkansas Pub. Serv. Comm'n*, 461 U.S. 375, 391 (1983). That portion of *Parden* not reached in *Welch* should be overruled in this case.

CONCLUSION

The judgment of the Supreme Court of South Carolina should be affirmed.

Respectfully submitted,

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